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Trial

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

New York, N.Y.

4 v.

S14 11 Cr. 1091 (VM)

5 PETER LESNIEWSKI, MARIE BARAN
6 and JOSEPH RUTIGLIANO,

7 Defendants.

8 -----x

9 July 29, 2013
10 9:00 a.m.

11 Before:

12 HON. VICTOR MARRERO,

13 District Judge

14 APPEARANCES

15 PREET BHARARA

16 United States Attorney for the
Southern District of New York

17 BY: JUSTIN S. WEDDLE

DANIEL BEN TEHRANI

18 NICOLE WARE FRIEDLANDER

Assistant United States Attorneys

19 LAW OFFICES OF JOSHUA L. DRATEL, P.C.

20 Attorneys for Defendant Peter Lesniewski

21 BY: JOSHUA LEWIS DRATEL

LINDSAY A. LEWIS

22 DURKIN & ROBERTS

Attorneys for Defendant Peter Lesniewski

23 BY: THOMAS ANTHONY DURKIN

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APPEARANCES CONTINUED

KOEHLER & ISAACS, LLP

Attorneys for Defendant Marie Baran

BY: JOEY JACKSON

JOSEPH W. RYAN, JR.

KEVIN MENEILLY

Attorneys for Defendant Joseph Rutigliano

- also present -

Annie Chen

Emma Larson, Government Paralegals

SA Frank LoMonaco, FBI

Yeni Yrizarry, Defendant Baran Paralegal

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1 (In open court)

2 (Trial resumed)

3 THE COURT: Just a few matters that --

4 MR. DURKIN: Judge, I had one minor housekeeping
5 matter.

6 THE COURT: Yes.

7 MR. DURKIN: If you don't mind, can I introduce my
8 wife and law partner, Janice Roberts.

9 THE COURT: Good morning. Welcome.

10 MR. DURKIN: Our partner, Joshua Herman.

11 THE COURT: How do you do and welcome.

12 MR. DURKIN: And your clerk has been kind enough to
13 tell me that he is going to prepare one of those cell phone
14 orders, if that's OK.

15 THE COURT: That is fine.

16 I hope their presence doesn't crimp your style.

17 MR. DURKIN: She's been known to do that.

18 THE COURT: A couple of things.

19 One, the court received a letter from the government
20 dated July 28 in the form of a motion in limine to preclude
21 some testimony by Ms. Baran's, one of Ms. Baran's witnesses a
22 Ralph Domenici. We will turn to that at the appropriate
23 moment. I am just acknowledging its receipt.

24 Second, we left open on Friday the Court's ruling on
25 the government's offer to put on witnesses with regards to

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1 Dr. Lesniewski's malpractice insurance issues. I indicated
2 what my preliminary thoughts on that matter were, but leaving
3 open the precise ruling. In this connection I call to your
4 attention three cases that I believe are on point and my basis
5 for my ruling, United States v. Khadir, 718 F.3d 115, (2d Cir.
6 2013). In that case the government sought to introduce certain
7 photos of the defendant in which the defendant is shown posing
8 with some weapons. That was introduced in response to
9 statements made by defense counsel during opening statements in
10 which the defense sought to portray the defendant as a
11 peaceful, law-abiding person. The Second Circuit essentially
12 indicated that it was permissible for the government to
13 introduce the photos as evidence of motive, opportunity, and
14 intent. The Second Circuit laid out certain standards in that
15 case to guide district courts in considering this kind of
16 evidence under these circumstances.

17 Two district court cases on point. United States v.
18 Vargas, in the district court. It's reported at 06-2788 Cr. in
19 the Second Circuit 279 F.App'x 56 (2008) WL 40180176. And
20 United States v. English, 293 F. App'x 39 (2008) WL 4280062.

21 In all of these cases the Second Circuit essentially
22 endorsed rulings by the district court allowing for the
23 government to introduce evidence to rebut statements made by
24 the defense in opening remarks. In the Khadir case the Second
25 Circuit laid out standards for the Court to consider. I will

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lay those out at the appropriate time.

THE COURT: Yes. I'm sorry. Both of you rose at the same time.

MS. FRIEDLANDER: Your Honor, I apologize for interrupting the Court. We sent an e-mail to chambers yesterday. I am not sure if the Court has had an opportunity to see it, but we spoke with defense counsel yesterday. We understand that Dr. Lesniewski's current intention is not to present a case, and in light of that, we have agreed not to offer the malpractice evidence in our case in chief.

MR. DURKIN: That's correct, your Honor.

MS. FRIEDLANDER: I apologize for any miscommunication. We did just speak yesterday.

THE COURT: I spent the entire weekend checking my e-mails, as you can imagine. Yes.

MR. DURKIN: That is correct. We do intend to offer a couple of stipulations, but we are not presenting a case. Dr. Lesniewski is not testifying, nor is the expert.

THE COURT: All right. Thank you again.

If there is nothing else at the moment, bring in the jury. Yes, Mr. Jackson.

MR. JACKSON: Judge, would you like me to address the Ralph Domenici.

THE COURT: Not at this point.

MR. JACKSON: I will address it, of course, when your

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1 Honor directs me or asks me or inquires of me. I wanted to
2 address a subpoena that we received, that was e-mailed
3 apparently last night to Ms. Baran directing her to bring all
4 these items, but I will address that when it is appropriate.

5 THE COURT: Thank you.

6 MR. JACKSON: Thank you, Judge.

7 MS. FRIEDLANDER: Your Honor, one brief matter. We
8 would like to interrupt Agent Tumulty's testimony, which will
9 take some time, just to put on the New York Times witness, who
10 will only testify for a moment, and the Long Island Rail Road
11 witness.

12 Each of those witnesses will be just we think a few
13 minutes at most. I think defense counsel has no problem with
14 it, if it is OK with the Court.

15 I have represented to the New York Times that as the
16 Court, I let them know what your Honor said from the bench,
17 which is that the Court will not allow questioning of the New
18 York Times witness beyond authenticity questions.

19 THE COURT: Thank you.

20 Mr. Dratel.

21 MR. DRATEL: No, your Honor. I just want to speak to
22 the court reporter.

23 THE COURT: All right. Bring in the jury.

24 (Jury present)

25 MR. WEDDLE: Your Honor, if you don't mind, just

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1 before we call our first witness I thought I would read a few
2 stipulations. And then we have a few items, five items in
3 particular that I think were offered and received, but when we
4 were checking the transcript just to double check everything,
5 in the transcript they didn't show up as received. So I don't
6 know if your Honor would like me to reoffer them in front of
7 the jury just so we have that clarified for the transcript.

8 THE COURT: That is fine. Yes.

9 MR. WEDDLE: Thank you.

10 Your Honor, one final thing is that a number of the
11 summaries that Dr. Barron presented were put on the screen and
12 discussed at length, but I am not sure that they were formally
13 received, so we would just offer those. I am going to get a
14 list of the numbers.

15 THE COURT: OK.

16 (Continued on next page)

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1 (Jury present)

2 THE COURT: Good morning. Welcome back.

3 The government will call its next witness.

4 MR. WEDDLE: With the Court's permission, your Honor,
5 we would like to read some stipulations into the record just
6 prior to calling our next witness.

7 THE COURT: All right. Proceed.

8 MR. WEDDLE: The first one I have, your Honor, is
9 Government Exhibit 1604. It is a business records stipulation
10 relating to certain records of Aflac TransAmerica and CUNA.

11 It is background information so I don't think I even
12 need to read that one into the record, but I would just offer
13 1604 as a stipulation of the parties.

14 THE COURT: Admitted as stipulated.

15 (Government's Exhibit 1604 received in evidence)

16 MR. WEDDLE: The next one is Government Exhibit 1605,
17 which says it is stipulated by the parties that, if called as a
18 witness, a representative of Railroad Retirement Board would
19 testify as follows:

20 Actually, your Honor, I think that I have already read
21 this one, but this is one that I read and I offered and I think
22 we just wanted to clarify that that had been received, 1605,
23 relating to Railroad Retirement Board records used as
24 background by Mr. Murray.

25 The next stipulation I have is Government Exhibit 1608

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1 which says that the parties stipulate that, if called as a
2 witness, a representative of the New York State office of Parks
3 and Recreation would testify that Government Exhibits 554-A
4 through 554-E are sign-in sheets for the Alfred E. Smith Sunken
5 Meadows State Park Golf Course. The sign-in sheets relate to
6 the years 2004 through 2008 respectively, and include the dates
7 on which Joseph Rutigliano, the defendant, signed in to play
8 golf. Users of the golf course are asked to sign in before
9 playing golf. These sign-in sheets made and kept in the
10 ordinary course of business. That's Government Exhibit 1608.

11 And I have Government Exhibit 1609, which states that,
12 if called as a witness, a representative of United Healthcare
13 Corporation would testify that Government Exhibit 10-A includes
14 spreadsheets titled, and then it gives the title of the
15 spreadsheets listing all claims made by Peter Lesniewski, the
16 defendant, and Peter Ajemian for patients under the Empire Plan
17 of United Healthcare as of January 7, 2013.

18 Government Exhibit 650 contains a spreadsheet titled
19 Michael Stavola claim HX listing all claims made on behalf of
20 Michael Stavola by, among others Ralph Parisi under the Empire
21 Plan of United Healthcare as of June 29, 2010. United
22 Healthcare retains records in the ordinary course of its
23 business activity for seven years. Older records may be
24 retained if otherwise accessed by the claim department within
25 the seven-year retention period.

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1 The spreadsheets contain the following data fields,
2 among others. And then it list the field, the column heading
3 and describes what each of those column headings mean. I am
4 going to skip all of that detail, but it's in the stipulation.

5 Then it says, Claims for reimbursement can be
6 submitted to UHC by a provider by mail, fax or electronic
7 communication. Electronic transmission of claims does not
8 automatically result in a paper record. Rather, the data
9 entered by the provider is electronically transmitted into
10 UHC's database.

11 Claim information contained in Government Exhibits
12 10-A and 650 and in particular the FLN office number field
13 indicate that Peter Lesniewski, Peter Ajemian, and Ralph Parisi
14 submitted claims to UHC electronically. In particular,
15 electronic claims were submitted to UHC for Gary Supper, Regina
16 Walsh, and Michael Stavola.

17 Electronic claims are received by UHC computers in
18 Colorado Springs, Colorado; Chaska, Minnesota; or Elk River,
19 Minnesota.

20 The claim information contained in Government Exhibit
21 650 and in particular the series ID field indicates that UHC
22 reimbursed Peter Lesniewski, Peter Ajemian, and Ralph Parisi by
23 electronic payment.

24 In particular UHC made electronics payments as
25 reimbursements for services rendered to Gary Supper, Regina

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Walsh, and Michael Stavola.

Electronic payments are issued by UHC's central treasury in Minnetonka, Minnesota, and/or Hartford, Connecticut, by automated clearing house, otherwise known as ACH, to the provider's bank account.

If called as a witness, a representative of the Empire Plan of UHC would testify that it would not reimburse providers for office visits and medical tests performed to document fraudulent disability claims.

And finally, your Honor, I have Government Exhibit 1610, which is another stipulation, which says, if called as a witness, a representative of the Railroad Retirement Board would testify as follows:

Government Exhibit 30 contains business records of the RRB showing the amount of monthly disability benefits paid to Ostap Baran for specific periods of time from July 1, 2004 through December 31, 2011. These records were made and kept in the ordinary course of business.

The payment beginning date entry shows the start of the particular rate period in the format year month day. The payment end date shows the end of the particular rate period. For each rate period the amount of benefits paid each month during that rate period is listed in the entry Payment Recur. Tot. Amount as a dollar figure.

So I offer each of those stipulations that I just

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1 read.

2 THE COURT: Admitted as stipulated.

3 (Government's Exhibits 1605, 1608, 1609, and 1610
4 received in evidence)

5 MR. WEDDLE: Then there were some stipulations that I
6 previously read and I believe offered, but we just wanted to
7 make sure it was clear in the transcript that these
8 stipulations were received; and, in addition, that several
9 exhibits were received. The stipulations are 1605, 1606, and
10 1607. The exhibits are Government Exhibit 530, Government
11 Exhibit 10, and then several of the summary charts that Dr.
12 Barron testified about namely Government Exhibits 453, 454, 455
13 and 456, we offer those exhibits as well, your Honor.

14 MR. DRATEL: Your Honor, we may be heard about the
15 charts. We can do it later obviously.

16 THE COURT: Let's do it later.

17 MR. DRATEL: Thank you.

18 THE COURT: All right.

19 MR. WEDDLE: Thank you, your Honor.

20 THE COURT: Call your witness.

21 MS. FRIEDLANDER: The government calls Brent McDonald.

22 BRENT McDONALD,

23 called as a witness by the Government,

24 having been duly sworn, testified as follows:

25 DIRECT EXAMINATION

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McDonald - direct

1 BY MS. FRIEDLANDER:

2 Q. Good morning, where do you work?

3 A. I work at the New York Times.

4 Q. What do you do there?

5 A. I am a video journalist.

6 Q. Have you reviewed a video marked Government Exhibit 550 and
7 a photograph marked Government Exhibit 551?

8 A. I have.

9 Q. Were those published on the New York Times website?

10 A. They were.

11 Q. When approximately?

12 A. September 19th I believe?

13 Q. Of what --

14 A. 2008.

15 Q. When were the photo and videotape taken approximately?

16 A. They were between mid-July on mid-August of 2008.

17 Q. How do you know that?

18 A. Because I was there. I shot them.

19 Q. Do Government Exhibits 550 and 551 truly and accurately
20 represent the activities depicted in them?

21 A. They do.

22 Q. Do you know who is shown in the photo and video marked 550
23 and 551?

24 A. Joe Rutigliano.

25 Q. How do you know that.

D72nles1

McDonald - direct

1 A. I addressed him as Mr. Rutigliano and he responded.

2 MS. FRIEDLANDER: The government offers 550 and 551.

3 THE COURT: Mr. Ryan.

4 MR. RYAN: May I have a voir dire?

5 THE COURT: Yes.

6 VOIR DIRE EXAMINATION

7 BY MR. RYAN:

8 Q. Do you keep a record of the date that the video was taken?

9 A. We don't. I mean, I looked on our website and the date
10 published of September 19, 2008.

11 Q. When the video was taken, it was logged or stored somewhere
12 in the storage facilities of the New York Times?

13 A. It is.

14 Q. The best you can give us for a date is July, August?

15 A. Well, the original files don't have the original date
16 attached to them any longer.

17 Q. At the time that the videotape was taken -- and I am going
18 to use the term logged in -- there was a record made as to when
19 it was taken?

20 A. I don't believe so.

21 MR. RYAN: Subject to those questions I have no
22 objection.

23 THE COURT: All right. Received subject to those
24 questions.

25 (Government's Exhibits 550 and 551 received in

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McDonald - direct

1 evidence)

2 MS. FRIEDLANDER: We will publish the photograph
3 first, that's 551. Thank you, Ms. Larson. If we could now
4 play the video, Government Exhibit 550.

5 (Video played)

6 MS. FRIEDLANDER: Thank you.

7 No further questions.

8 CROSS EXAMINATION

9 BY MR. RYAN:

10 Q. This video was logged in in the New York Times I am going
11 to say storage facility, correct?

12 A. I logged it.

13 Q. How did you know it was Mr. Rutigliano?

14 MS. FRIEDLANDER: Objection. Asked and answered.

15 THE COURT: Overruled.

16 Q. How do you know it was Mr. Rutigliano?

17 A. I went up to him addressed him as Mr. Rutigliano and he
18 responded .

19 Q. Did you check the log-in, the sign-in sheets to make sure
20 that that was him at the golf course?

21 A. Yes.

22 Q. Correct?

23 A. Yes.

24 Q. So he signed in his name? You got confirmation, he
25 identified himself, correct?

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McDonald - cross

1 A. Yes.

2 Q. Would you explain to the jury how this videotape was put
3 into your storage facility and put on your website? What's the
4 process?

5 A. It wasn't a videotape. It was recorded onto a Staple tape
6 drive so there's no tape.

7 Q. So it's digital?

8 A. It's digital.

9 Q. Just explain to the jury. That digital is then put on the
10 Times website, correct?

11 A. Yes.

12 Q. You said it was published on or about September 19, 2008?

13 A. Yes.

14 Q. Was it published in connection with an article about
15 Mr. Rutigliano?

16 A. Yes.

17 Q. Was the title of the article "Epidemic Among Railroad
18 Retirees" in words or substance? That was the headline?

19 A. I believe so. I don't know exactly what it read.

20 Q. It was an epidemic relating to the occupational
21 disability --

22 MS. FRIEDLANDER: Objection.

23 THE COURT: Sustained.

24 MR. RYAN: OK.

25 Q. This website was intended to allow this video that you took

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McDonald - cross

1 to be broadcast worldwide?

2 MS. FRIEDLANDER: Objection. Beyond the scope.

3 THE COURT: Sustained.

4 Q. When you say it was on the website, will you explain to the
5 jury what it means with respect to the public having access to
6 this video?

7 MS. FRIEDLANDER: Objection, your Honor. Beyond the
8 scope.

9 THE COURT: Overruled.

10 A. It appeared as videos did then; a video in the margins of
11 the article and also as a standalone video on our home page.
12 And then we have a library player where videos are archived and
13 stored as well.

14 Q. So that anyone could log into the New York Times website
15 and see this video?

16 MS. FRIEDLANDER: Objection. Beyond the scope of
17 authenticity.

18 THE COURT: Sustained.

19 Q. Let's take the still photograph that was just showed up
20 there. That still photograph, I am going to use the term was
21 logged in digitally in the New York Times storage facility,
22 correct?

23 A. Yes.

24 Q. Then it was used in a publication on the front page of the
25 New York Times on or about September 19, 2008, correct?

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McDonald - cross

1 A. To be honest, I don't remember where it appeared, the
2 article that is, in the paper.

3 Q. You never saw the article?

4 MS. FRIEDLANDER: Objection, your Honor.

5 THE COURT: Sustained.

6 MR. RYAN: OK.

7 Q. Well, the photograph of Mr. Rutigliano, if shown on the
8 front page of the New York Times, would be available to anybody
9 who wanted to read it whether by hand --

10 MS. FRIEDLANDER: Objection.

11 THE COURT: Sustained.

12 Q. Was that article and that still photograph available to the
13 general public on your website?

14 MS. FRIEDLANDER: Objection.

15 THE COURT: Asked and answered.

16 Q. The still photograph as opposed to video.

17 MS. FRIEDLANDER: Objection.

18 THE COURT: Asked and answered.

19 MR. RYAN: OK. Thank you very much.

20 THE COURT: Thank you. You're excused. You may step
21 down.

22 (Witness excused)

23 THE COURT: Mr. Tehrani.

24 MR. TEHRANI: The government calls William Shaw.

25 WILLIAM SHAW,

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McDonald - cross

1 called as a witness by the Government,

2 having been duly sworn, testified as follows:

3 DIRECT EXAMINATION

4 BY MR. TEHRANI:

5 MR. TEHRANI: Your Honor, just one second. I need to
6 pass up the hard copies of the exhibits.

7 Your Honor, may I approach?

8 THE COURT: Yes.

9 Q. Mr. Shaw, where do you work?

10 A. The Long Island Rail Road.

11 Q. What is your position?

12 A. I am deputy controller of disbursements and time and
13 attendance.

14 Q. What are your duties and responsibilities in that position?

15 A. I am in charge of all time and attendance and payroll for
16 the Long Island Rail Road.

17 Q. I'm showing you what's been marked for identification as
18 Government Exhibits 553 and 813. They are in front of you.

19 A. That's correct.

20 Q. Do you recognize those?

21 A. Yes, I do.

22 Q. What are they?

23 A. We call them wage extractions. They are time and
24 attendance records for these particular employees.

25 Q. Are they kept and made in the ordinary course of business

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Shaw - direct

1 of the Long Island Rail Road?

2 A. They are.

3 Q. Where does the information reflected in the reports come
4 from?

5 A. This information is a summary of all time and attendance
6 that is collected by the departments and sent to the corporate
7 payroll department for payment.

8 Q. So the information there is also the same information that
9 is used to pay employees?

10 A. That is correct.

11 MR. TEHRANI: Your Honor, the government offers
12 Government Exhibits 553 and 813.

13 MR. RYAN: Can I have a voir dire, Judge.

14 THE COURT: Yes.

15 VOIR DIRE EXAMINATION

16 BY MR. RYAN:

17 Q. You are aware that Mr. Rutigliano is a union official
18 during the period of time of 553?

19 A. I don't know about the time. I know he was an official.

20 Q. And do these records reflect --

21 MR. TEHRANI: Your Honor, I believe this is
22 cross-examination, not voir dire.

23 MR. RYAN: I object. I haven't finished the question.

24 THE COURT: We will hear the questions.

25 Q. Does this record that is being offered into evidence

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Shaw - direct

1 reflect time that Mr. Rutigliano was paid for as a union
2 official?

3 A. These records will show all payments made to the employee
4 for that particular year.

5 Q. That wasn't my question, sir.

6 My question was, does this time record, 553, cover
7 payments made to Mr. Rutigliano in his capacity as a union
8 official?

9 A. Yes.

10 MR. RYAN: No objection.

11 THE COURT: All right. Admitted without objection.

12 (Government's Exhibits 553 and 813 received in
13 evidence)

14 MR. RYAN: I will develop the balance on cross.

15 THE COURT: Anyone else?

16 All right. Thank you. Mr. Tehrani, continue.

17 BY MR. TEHRANI:

18 Q. Mr. Shaw, looking first at Government Exhibit 553, who are
19 those records for?

20 A. J. Rutigliano.

21 Q. What years are they for?

22 A. 1998 and 1999.

23 Q. Turning to page 2 -- Page 3. What's the --

24 A. I'm sorry, page 2 or 3.

25 Q. Page 2 I believe in your copy. It's page 3 on the screen.

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Shaw - direct

1 What is the yearly hourly overtime total for
2 Mr. Rutigliano in 1998?

3 A. 482 hours, point 17, which is hundredths.

4 Q. Then turning to the last page of the exhibit, what's the
5 yearly hourly overtime total for Mr. Rutigliano in 1999?

6 A. 475.42.

7 Q. I believe you mentioned when you were being questioned by
8 Mr. Ryan that these reports reflect overtime hours -- I'm
9 sorry. Union hours --

10 A. That's correct.

11 Q. -- by Mr. Rutigliano.

12 Which hours are those?

13 A. Under the column CON CDE, where you see a code 17, that
14 represents when an employee is out on a code 7, or union
15 business.

16 Q. So only the hours where there's this code 17 in that column
17 are hours worked as a union official?

18 A. When it's coded 17, that's when he gets paid for the union.

19 Q. And did the individual, or Mr. Rutigliano in this case,
20 actually work hours where there is a code 17?

21 A. Code 17 represents when an employee is out on union
22 business. So he is not working at the actual railroad. He's
23 working as a union rep or whatever the capacity of a union
24 person does.

25 Q. Turning to Government Exhibit 813, that is also in front of

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Shaw - direct

1 you.

2 A. OK.

3 Q. Who are those records for?

4 A. An O. Baran.

5 Q. What years are those for?

6 A. It starts in 1998 and ends in 2003.

7 Q. Looking at page 43, there is a Bates number on your
8 document, 142087.

9 A. OK.

10 Q. What is the yearly hourly overtime total for Mr. Baran in
11 2002?

12 A. 811.7.

13 Q. Turning to the last page of the document. What is the
14 yearly hourly overtime total for Mr. Baran in 2003?

15 A. 1,376.2.

16 MR. TEHRANI: No further questions.

17 THE COURT: Mr. Ryan.

18 CROSS EXAMINATION

19 BY MR. RYAN:

20 Q. Mr. Shaw, I am going to show you R-6.

21 Would you tell us whether or not you have ever seen
22 this document before in preparation for your testimony.

23 A. I have seen this document in my normal course of business
24 at the railroad. This is the first time I'm seeing it today.

25 Q. All right. But you keep records on a per-week basis, a

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Shaw - cross

1 cumulative total as to paid to date for each employee, correct?

2 A. That's correct.

3 Q. And R-6 reflects, as far as Mr. Rutigliano is concerned, a
4 date in September of I think it's '04 of his earnings as of
5 that date, correct?

6 A. You said '04?

7 Q. No, I could be wrong. What date is it?

8 A. I'm sorry. The check date is 11/10/1999.

9 Q. In the regular course of business, a statement is issued to
10 the employee like Mr. Rutigliano that summarizes the total
11 payments made for regular time, overtime, and union business,
12 correct?

13 A. That's correct.

14 Q. And does that record that you are looking at right now
15 appear to be kept in the regular course of business to record
16 those three elements for salary?

17 A. Can you repeat that. I'm sorry.

18 Q. Does that record appear to be made in the regular course of
19 business by the Long Island Rail Road concerning
20 Mr. Rutigliano?

21 A. Yes.

22 MR. RYAN: I offer it in evidence.

23 MR. TEHRANI: No objection.

24 THE COURT: Admitted without objection.

25 (Defendant's Exhibit R-6 received in evidence)

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Shaw - cross

1 Q. What was the effective date of the statement?

2 A. November 10, '99.

3 Q. As of November 10, what was the approximate amount of
4 moneys paid regular time?

5 A. \$15,128.

6 Q. What was the amount of moneys paid for overtime?

7 A. \$17,802.

8 Q. And what was the amount of time paid for union business?

9 A. \$25,484.

10 Q. That works out to be about 43 percent of the total payments
11 for union business? Would you take my word for it?

12 A. Sure.

13 MR. RYAN: Thank you. No further questions.

14 THE COURT: Anyone else?

15 CROSS EXAMINATION

16 BY MR. JACKSON:

17 Q. Sir, good morning.

18 Now, you are here to testify about the amount of
19 overtime hours. I think that's what Mr. Tehrani asked you
20 about, is that right?

21 A. I am here to verify these reports.

22 Q. Could you tell the jury whether or not Mr. Baran was
23 required to work overtime on the times noted on the report?

24 A. I wouldn't have that information.

25 Q. Could you tell the jury whether or not an electrician is

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Shaw - cross

1 mandated to be on duty at all times at the Long Island Rail
2 Road?

3 A. I can't answer that question.

4 Q. Could you tell the jury whether or not there are instances
5 where --

6 MR. JACKSON: I will just withdraw that briefly,
7 Judge.

8 Q. Could you tell the jury the amount of pain that Mr. Baran
9 might have been in as he worked that overtime?

10 MR. TEHRANI: Objection, your Honor.

11 THE COURT: Sustained.

12 Q. So all you are here to do, just to be clear, is to
13 authenticate records, is that accurate?

14 A. That's correct.

15 Q. But the underlying purpose for which a party may, for
16 example, have engaged in overtime activity, you wouldn't have
17 any knowledge as to that, is that right?

18 A. Correct.

19 MR. JACKSON: Good to meet you.

20 THE COURT: Mr. Tehrani, anything else?

21 MR. TEHRANI: Nothing further, your Honor.

22 THE COURT: Thank you. You're excused. You may step
23 down.

24 (Witness excused)

25 THE COURT: Mr. Tehrani.

D72nles1

Shaw - cross

1 MR. TEHRANI: Your Honor, the government calls Special
2 Agent Sean Tumulty of the FBI.

3 THE COURT: Mr. Tehrani, I see that there are a
4 considerable number of exhibits for this witness. Are there
5 any that are not objected to?

6 MR. TEHRANI: Your Honor, we are not going to be going
7 through all of those exhibits. I can read the exhibits that we
8 will be going through.

9 THE COURT: Would you do that.

10 MR. TEHRANI: Sure.

11 THE COURT: First let's swear in the witness.

12 MR. DURKIN: Judge, we had raised a couple of
13 objections earlier. We can raise them later.

14 THE COURT: All right.

15 MR. DURKIN: They would be the same objections as
16 Friday.

17 THE COURT: Swear in the witness.

18 SEAN TUMULTY,

19 called as a witness by the Government,

20 having been duly sworn, testified as follows:

21 DIRECT EXAMINATION

22 BY MR. TEHRANI:

23 MR. DURKIN: Judge, I'm sorry. Mr. Tehrani tells me
24 that what we discussed on Friday they are not offering.

25 THE COURT: All right.

D72nles1

Tumulty - direct

1 THE COURT: So, Mr. Tehrani, would you then read into
2 the record the exhibits that are to be admitted without
3 objection.

4 MR. TEHRANI: Absolutely, your Honor. The first is
5 303-A0.

6 MR. JACKSON: Judge, do you have an objection to me
7 standing NEXT to him as he does that. There were some that I
8 had objections to. I just want to make sure. Your Honor said
9 without objection?

10 THE COURT: Without objection. Right.

11 MR. JACKSON: I just want to make sure.

12 MR. TEHRANI: 303-A0, your Honor, 719, 100-A through
13 D, which I believe are all in evidence, 113-A through D which
14 are all in evidence, 803, 800, 800-A, 801, 801-A through E,
15 554-A through E, 820, and that's it. 820 there may or may not
16 be an objection. We can get to that as we get to it.

17 MR. JACKSON: Judge as we get to the 800 series, if I
18 might just reserve my right to object, at that point.

19 THE COURT: All right.

20 MR. JACKSON: Thank you, Judge.

21 MR. TEHRANI: Your Honor, all the other exhibits are
22 entered into evidence.

23 THE COURT: Yes. They are admitted without objection.

24 (Government's Exhibits 303-A0, 719, 100-A through D,
25 113-A through D, and 554-A through E received in evidence)

D72nles1

Tumulty - direct

1 BY MR. TEHRANI:

2 Q. Special Agent Tumulty, who is your current employer?

3 A. The Federal Bureau of Investigation.

4 Q. What is your title?

5 A. Special Agent.

6 Q. How long have you worked at the FBI?

7 A. Approximately two years.

8 Q. Are you in a particular squad?

9 A. Yes. I'm in the white collar squad of the criminal
10 division.

11 Q. Describe your duties and responsibilities as a Special
12 Agent.

13 A. We conduct criminal investigations. As part of the white
14 collar squad it includes securities, you know, health care,
15 mortgages and the like. Our duties include surveillance,
16 interviews, writing reports, documentation.

17 Q. Did there come a time when you became involved in an
18 investigation regarding allegations of disability fraud from
19 the Long Island Rail Road?

20 A. Yes, in December 2012.

21 Q. Showing you what's been marked and entered into evidence as
22 Government Exhibit 303-A0.

23 MR. TEHRANI: Can we put Government Exhibit 303-A on
24 the screen.

25 Q. Special Agent Tumulty, what is the document that you have

D72nles1

Tumulty - direct

1 in front of you?

2 A. This is a document written by Gary Supper to Dr. Lew.

3 Q. Were you asked to locate that document --

4 MR. DURKIN: Your Honor?

5 THE COURT: Yes, Mr. Durkin.

6 MR. DURKIN: Just so the record is clear, I think the
7 government will agree this was already shown, a copy of this
8 was shown as part of an earlier exhibit.

9 MR. TEHRANI: That is correct, your Honor.

10 THE COURT: Yes.

11 MR. RYAN: I am going to object to relevance.

12 THE COURT: Overruled.

13 Q. Special Agent Tumulty, were you asked to locate that
14 document in Dr. Lesniewski's original file for Mr. Supper?

15 A. Yes.

16 Q. And was the document located in the original file?

17 A. Yes, it was.

18 Q. Does that appear to you to be the original version of that
19 document?

20 A. Yes.

21 Q. Were you asked to see if the note was located in the RRB
22 claim file for Mr. Supper?

23 A. Yes.

24 Q. And was it?

25 A. No.

D72nles1

Tumulty - direct

1 MR. DURKIN: Object to the relevance and move to
2 strike.

3 THE COURT: Mr. Tehrani.

4 MR. TEHRANI: Your Honor, the relevance is that this
5 document was located in the original claim file for
6 Dr. Lesniewski and was not located in the claim file for
7 Mr. Supper.

8 MR. DURKIN: Judge, that's misstating the claim file.
9 It is a patient file.

10 MR. TEHRANI: If I misspoke, I apologize. It's
11 located in Dr. Lesniewski's patient file for Mr. Supper.

12 MR. DURKIN: That's all.

13 THE COURT: Overruled.

14 Q. Special Agent Tumulty, during the course of your
15 investigation did you review any documents relating to Joseph
16 Rutigliano?

17 A. Yes.

18 Q. Looking at Government Exhibit 100-A, which is in the binder
19 in front of you.

20 MR. TEHRANI: Could we put that on the screen.

21 Q. This document by stipulation comes from Mr. Rutigliano's
22 RRB claim file. Do you recognize it?

23 A. Yes.

24 Q. What is it?

25 A. This is the AA-1d form for Joseph Rutigliano.

D72nles1

Tumulty - direct

1 Q. Looking at question No. 1, that's his name there?

2 A. Yes, it is.

3 Q. If we look at the top right corner --

4 MR. TEHRANI: Could we blow that up.

5 Q. When was this document filed?

6 A. December 21, 1999.

7 Q. Turning to question 6.

8 MR. TEHRANI: Question 6, page 2.

9 Q. That lists the medical conditions causing Mr. Rutigliano to
10 file. Do you see that?

11 A. Yes.

12 Q. And it lists five conditions:

13 Low back pain, osteoarthropathy secondary to fracture
14 and osteoarthritis;

15 Cervical pain, osteoarthritis;

16 Tear of the medial meniscus and osteoarthritic changes
17 in the right knee;

18 Carpal tunnel syndrome in the right wrist;

19 Right shoulder, rotator cuff disease.

20 Do you see that?

21 A. Yes.

22 Q. And then question 11 --

23 THE COURT: Mr. Tehrani, please approach.

24 MR. RYAN: I am going to object, your Honor.

25 THE COURT: Approach.

D72nles1

Tumulty - direct

1 (At sidebar)

2 THE COURT: Mr. Tehrani, I don't see, one, the
3 relevance of this information coming out through this witness.
4 He is an investigator. Why are you getting into the substance
5 of these claims.

6 Two, it is cumulative. All of this information is
7 already in the record through witnesses who are in a better
8 position to examine the substance of these files.

9 MR. TEHRANI: Your Honor, Special Agent Tumulty is
10 going to be testifying in part as a summary witness and in part
11 related to the investigation that he's done.

12 THE COURT: So far I haven't seen any of the
13 investigation that he has done. He has found documents in the
14 files. He's testified to information that is already on the
15 record through other witnesses. What is he adding?

16 MR. WEDDLE: May I just have one moment.

17 (Government counsel conferred)

18 MR. TEHRANI: Your Honor, certain portions of
19 Mr. Rutigliano's file have come in at various points, but no
20 witness has put together the entire application that
21 Mr. Rutigliano submitted in order to obtain what the government
22 alleges is a fraudulent disability.

23 So, while the exhibit is in evidence, Government
24 Exhibit 100, the claim file is in evidence in its entirety.
25 There has been no one who has presented to the jury the entire

D72nles1

Tumulty - direct

1 application in its entirety.

2 THE COURT: I am not persuaded that this is the
3 witness to do it. All he could testify is that he found this
4 document in a file. What it contains, what difference does it
5 make?

6 MR. TEHRANI: Your Honor, it could be any summary
7 witness. We are putting what is in evidence in front of the
8 jury so the jury can see what this application --

9 THE COURT: If you want to do that, you don't need to
10 go over every single question on material that is already in
11 evidence. Just summarize it.

12 MR. TEHRANI: Sure. Absolutely, your Honor.

13 THE COURT: Anything else?

14 MR. RYAN: I am going to object on the ground that
15 this is in the guise of a summation through an FBI agent. I
16 think the law enforcement role is supposed to impress the jury.
17 As your Honor pointed out, all of this is in evidence, and the
18 prosecutor should sum up on it in his summation, not through an
19 FBI agent.

20 MR. DURKIN: I was going to say the same thing, Judge.
21 I don't think this is the kind of evidence that is appropriate
22 for a summary witness. There is nothing overly complicated,
23 and he should not be permitted to testify to an ultimate
24 conclusion of fact in the case.

25 THE COURT: Again, what I will allow is you do

D72nles1

Tumulty - direct

1 indicate this was the file he found without going into the
2 specific questions.

3 MR. TEHRANI: So we can't show the questions at all,
4 your Honor?

5 MR. WEDDLE: Your Honor, I mean the document is in
6 evidence. We could like to just publish parts of it to the
7 jury. It seems a lot more interesting to do it with a
8 give-and-take with a witness. It is totally standard to do
9 this with a summary witness at the end of the case.
10 Alternatively, Mr. Tehrani would just stand at the podium and
11 publish the document to the jury, which I think is a little bit
12 more boring for everybody, but it is not argument. It's simply
13 publishing documents that are in evidence. We are going to do
14 it quickly.

15 THE COURT: Publish the document in summary form. If
16 you need anything from him, then you can ask him questions
17 about what he may know based on his investigation.

18 MR. TEHRANI: OK. Can I publish it and go through
19 certain portions of the document?

20 THE COURT: Yes.

21 MR. TEHRANI: I will do it quickly.

22 THE COURT: Without going question by question and
23 asking him if that is what it says. It says what it says, and
24 it's already in evidence.

25 MR. TEHRANI: OK.

D72nles1

Tumulty - direct

1 (In open court)

2 THE COURT: Mr. Tehrani.

3 MR. TEHRANI: Thank you, your Honor.

4 So we will just go through this document quickly in
5 very summary fashion. We can just blow up question 11, which
6 indicates that Mr. Rutigliano could no longer work because of
7 his condition as of October 29, 1999.

8 Question 12, which I will not read, describes how
9 Mr. Rutigliano's condition prevents him from working.

10 Question 13 indicates that his condition prevents him
11 from working now.

12 Question 19. Next page.

13 The physician listed is Peter J. Lesniewski.
14 Underneath lists the days of treatment beginning on April 15,
15 1997.

16 Question 14 on the next page. Enter the name of the
17 medical doctor who imposed the restriction. Dr. Peter J.
18 Lesniewski.

19 Next page, question 39. The daily activity matrix,
20 indicating that sitting, standing, walking, bathing, dressing
21 indoor chores, outdoor chores, driving a motor vehicle, using
22 public transportation and writing English are all marked as
23 hard.

24 I will not read all of the explanations, but certain
25 of them.

D72nles1

Tumulty - direct

1 For sitting, back and knee pain when sitting for more
2 than short periods;

3 Bathing, back and knee pain when entering, bending,
4 and exiting shower or bath;

5 Dressing, back, knee, and neck pain when bending to
6 tie shoes and put on trousers;

7 Writing, right hand wrist cramping when writing long
8 notes or letters.

9 Question 40, lists additional information that
10 describes your daily activities during a normal day.

11 I won't read it in its entirety, but note that
12 Mr. Rutigliano indicates that he was an avid racquetball and
13 tennis player, but could not play those sports any longer due
14 to his painful back, right knee, and right hand/wrist.

15 Page 10 of the document, signed under the
16 certification that reads in part: I know that if I make false
17 or fraudulent statements in order to receive benefits from the
18 RRB, or if I fail to disclose earnings or report employment of
19 any kind to the RRB, I am committing a crime which is
20 punishable under federal law.

21 I certify that the information I gave to the RRB on
22 this application is true to the best of my knowledge.

23 I agree to immediately notify the RRB if I perform any
24 work including self-employment.

25 I know that if I am receiving a disability annuity and

D72nles1

Tumulty - direct

1 fail to report work and earnings promptly, I am committing a
2 crime punishable by federal law and may result in criminal
3 prosecution and/or penalty deductions in my annuity payments.

4 You can put up Government Exhibit 100-C on the screen.
5 This is a vocational report for Mr. Rutigliano from his RRB
6 claim file. It lists his jobs as railroad conductor, president
7 of the local chairman in question 6 at the bottom.

8 (Continued on next page)

D7TPLES2

Tumulty - direct

1 (Continued) Question 12 on the next page, "Please
2 describe your basic duties." It refers to an attached
3 vocational report supplement, slash, job description No. 5
4 signed, dated December 21st, 1999.

5 And then two pages later there is the attached job
6 description, vocational report supplement. And, again, I will
7 not read this in its entirety, but there are 12 activities or
8 job responsibilities that are listed in the job description
9 that's on the next page. What follows then is a more fulsome
10 description of each of those activities, each one, other than
11 question 12, ending with "I was no longer able to do this work
12 because of the severe disabilities I suffered."

13 Turning to activity five in the middle refers to a
14 Catch 22. "I have poor leverage caused by my painful back and
15 right knee requiring increased manual exertion to turn valves.
16 This was a Catch 22. As I could not depend on my back and
17 right knee for support or leverage. I had to employ increased
18 leverage and exertion. As I tried to use my hands, my back,
19 knee and neck pain uncontrollably flared up such that I could
20 not do my work. This caused increased numbness and tingling in
21 my right wrist and hand such that I could not use it to do my
22 work."

23 Turning now to Government Exhibit 100C, the vocational
24 report from Mr. -- I'm sorry, 100B. The medical assessment
25 from Mr. Rutigliano's claim file. Under A, exertional

D7TPLES2

Tumulty - direct

1 descriptions, No. 1, in an eight hour workday, the claimant can
2 stand and/or walk with normal breaks for less than two hours
3 total. Before we go through that in more detail --

4 MR. DIRKIN: Objection. This is cumulative, Judge.

5 THE COURT: Sustained.

6 MR. TEHRANI: The document's in evidence. Can we just
7 note that the document is signed?

8 MR. DIRKIN: Objection.

9 THE COURT: Sustained.

10 Q. Turning to Government Exhibit 100D.

11 MR. DIRKIN: Same objection.

12 THE COURT: What's the question?

13 MR. TEHRANI: Your Honor, I'm just summarizing these
14 documents that are already in evidence.

15 Q. The document on Peter Lesniewski's letterhead signed on the
16 second page by Peter Lesniewski, concluding with the paragraph
17 "I'm aware of Mr. Rutigliano's duties for Long Island Rail
18 Road."

19 MR. DIRKIN: Objection.

20 Q. "As a result of the above-noted injuries, which are
21 permanent in nature, he's disabled for work with his regular
22 occupation for Long Island Rail Road."

23 MR. DIRKIN: Same objection.

24 THE COURT: This is submitted for summary purposes.
25 Anything else?

D7TPLES2

Tumulty - direct

1 MR. TEHRANI: Not on these documents, your Honor.

2 Q. Mr. Tumulty, after Mr. Rutigliano was awarded a disability,
3 are you aware of any activities that he engaged in?

4 A. Yes.

5 Q. And what were those?

6 A. Golfing.

7 MR. TEHRANI: And, your Honor, we read a stipulation
8 earlier regarding Government's Exhibits 554A through 554E.

9 Q. Special Agent Tumulty, have you reviewed those documents?

10 A. Yes.

11 Q. And what are they?

12 A. Golf sign-in sheets.

13 Q. For what periods of time?

14 A. The spring and the summer months, roughly May through
15 December, from 2004 through 2008.

16 Q. And those were sign-in sheets for Mr. Rutigliano?

17 A. Yes, for the Sunken Meadow Golf Course.

18 Q. And approximately how many times in the period between 2004
19 and 2008 that you reviewed, did Mr. Rutigliano sign in to play
20 golf?

21 A. Approximately 110.

22 Q. Special Agent Tumulty, turning to Government Exhibit 719.

23 MR. TEHRANI: Put that up on the screen.

24 Q. What is this document?

25 A. This is a continuing disability update report for Joseph

D7TPLES2

Tumulty - direct

1 Rutigliano.

2 Q. And the top left, it's a document of the United States of
3 America Railroad Retirement Board; do you see that?

4 A. Yes.

5 Q. And on the second page it appears to be signed?

6 A. Yes.

7 Q. And dated?

8 A. Yes.

9 Q. And when is it dated?

10 A. March 11th, 2011.

11 Q. And it's under a certification?

12 A. Yes.

13 Q. Or an understanding. The document says, "I understand that
14 civil and criminal penalties may be imposed upon me for
15 providing false or fraudulent statements"?

16 A. Correct.

17 Q. And "No. 3, failing to promptly report work earnings to the
18 Railroad Retirement Board"?

19 A. Yes.

20 Q. "I affirm to the best of my knowledge that the information
21 I provide on this form is true, complete and correct"?

22 A. Correct.

23 Q. Now, turning back to the first page, there's a report
24 period listed. Do you see that?

25 A. Yes.

D7TPLES2

Tumulty - direct

1 Q. And the report period is from April 1st, 2000, to the
2 present?

3 A. Correct.

4 Q. And then turning to the second page, question 2, "During
5 the report period, did you work for someone other than the
6 railroad or were you self-employed?" And what's the answer
7 there?

8 A. It's -- there's an X across the box for no.

9 Q. And then question 4, "which word best describes your health
10 now as compared to the beginning date of the report period?"
11 Do you see that?

12 A. Yes.

13 Q. And what's the answer?

14 A. There is an X across the box for worse.

15 Q. And turning to the next page there's an envelope, and it's
16 addressed to the Railroad Retirement Board, Federal Building,
17 26 Federal Plaza, New York, New York?

18 A. Correct.

19 Q. And looking at the postmark, postmarked from Tampa,
20 Florida?

21 A. Yes.

22 Q. In March 2011?

23 A. Yes.

24 Q. Now, Special Agent Tumulty, were you also involved in an
25 investigation of Ostap Baran?

D7TPLES2

Tumulty - direct

1 A. Yes.

2 MR. TEHRANI: And before we get to that, if we can,
3 just in a summary fashion, go through Government's Exhibits
4 113A through D, your Honor. Starting first with 113A, this was
5 a form A1E for Ostap Baran from Mr. Baran's RFQ claim file,
6 stamped on the bottom December 29th, 2003.

7 Question 6 on the next page describes the medical
8 conditions causing you to file, acid reflux, hypertension,
9 spinal stenosis, Hoaglund heel on right foot with chronic
10 Achilles tendonitis, and hearing loss.

11 Question 11, enter the date you could no longer work
12 because of your condition, and the date is November 21st, 2003.
13 Question 12 then asks how Mr. Baran's condition prevents him
14 from working. Cannot bend, lift, climb, crouch, kneel or walk
15 on uneven ground, and then there's more, including, "I have
16 difficulty hearing what is said over intercom system and cannot
17 understand what people are saying when there is background
18 noise present."

19 Turning to question 19 on the next page. The treating
20 physician is listed as Dr. Peter Lesniewski. Dates treated,
21 December 11th, 2001, through the present. Question 24 on the
22 next page, enter the name of the medical doctor who imposed the
23 restriction, Dr. Peter Lesniewski.

24 MR. DIRKIN: Objection, cumulative.

25 THE COURT: Sustained. This is for summary purposes?

D7TPLES2

Tumulty - direct

1 MR. TEHRANI: Sure, your Honor.

2 THE COURT: Summarize quicker.

3 MR. TEHRANI: Sure, your Honor. Question 39 on the
4 next page, again, this lists a series of activities, and just
5 to summarize, sitting, standing, walking, dressing, indoor
6 chores, driving motor vehicle, using public transportation,
7 conducting personal business, all marked as hard. Outdoor
8 chores marked as impossible.

9 MR. JACKSON: I'm sorry, Judge. I thought it says he
10 does not do that at all. I see it says "not at all" not
11 "impossible."

12 THE COURT: Sustained.

13 MR. TEHRANI: Your Honor, I apologize. It is marked
14 as "not at all." Definition of not at all is, "I cannot do the
15 activity even with help."

16 The explanation for sitting, difficult due to lower
17 back pain. Driving a motor vehicle explanation, it's difficult
18 sitting due to lower back pain. Question 40 then lists any
19 different information that describes your daily activities
20 during a normal day. Turning to Page 10 it's signed, dated,
21 December 29th, 2003, under the name certification that we went
22 through for Mr. Rutigliano's application.

23 113C is a vocational report from Mr. Baran's claim
24 file. Turning to the next-to-last page it's signed, dated
25 December 29th, 2003.

D7TPLES2

Tumulty - direct

1 104B it's a medical assessment. B as in boy -- 113B,
2 medical assessment for Mr. Baran from his RRB claim file. The
3 last page appears to be signed and the name underneath is Peter
4 Lesniewski.

5 113D, also from Mr. Baran's RRB claim file. 113D, as
6 in dog. A letter on Peter J. Lesniewski's letterhead relating
7 to Ostap Baran. Second page appears to be signed and
8 concludes, "I'm aware of his job occupation on the Long Island
9 Rail Road as an electrician. Given the above-noted diagnosis,
10 it can be stated within a reasonable degree of medical
11 certainty that this patient is disabled for his job occupation
12 and that this disability is ongoing and permanent."

13 Q. Now, Special Agent Tumulty, after Mr. Baran retired, do you
14 know whether he and Marie Baran did any international
15 traveling?

16 A. Yes, they were both booked for international travel.

17 MR. JACKSON: Judge, I'm just going to object on
18 relevance grounds.

19 THE COURT: Overruled.

20 Q. The government -- have you reviewed Government Exhibit 803,
21 which is before you?

22 A. Yes.

23 Q. And what is Government Exhibit 803?

24 A. A record of booked travel flights for Ostap Baran and Marie
25 Baran.

D7TPLES2

Tumulty - direct

1 Q. And are these records that the FBI has access to?

2 A. Yes. It's from a system called TECS, Treasury Enforcement
3 Communication System. It's a communal database between law
4 enforcement agencies that can review travel records.

5 MR. TEHRANI: Your Honor, the government offers
6 Government Exhibit 803.

7 MR. JACKSON: Objection.

8 THE COURT: Overruled.

9 (Government's Exhibit 803 received in evidence)

10 Q. Based on your review of those records, what are some of the
11 places that Mr. Baran and Marie Baran have booked travel to?

12 MR. JACKSON: Objection again, Judge.

13 THE COURT: Summarize, Mr. Tehrani. Just indicate the
14 points you're trying to make.

15 Q. Special Agent Tumulty, do those records indicate that Marie
16 Baran and Ostap Baran have booked travel to Italy, Spain,
17 Aruba, Dominican Republic on several occasions, Germany,
18 Vancouver and Mexico?

19 A. Yes.

20 Q. And I'm showing you what's been marked as Government
21 Exhibit 820. Do you recognize that?

22 A. Yes.

23 Q. And what is it?

24 A. It's a passport for Marie Baran.

25 Q. And when was it issued?

D7TPLES2

Tumulty - direct

1 A. It was issued October 19th, 2007.

2 MR. TEHRANI: And the government offers Government
3 Exhibit 820.

4 MR. JACKSON: Objection.

5 THE COURT: Overruled.

6 (Government's Exhibit 820 received in evidence)

7 Q. And were there stamps in the passport?

8 A. Yes.

9 Q. And could you just indicate some of the places that are
10 stamped in the passport?

11 A. Egypt --

12 MR. JACKSON: Your Honor, I object.

13 THE COURT: Is that the same that you just testified
14 to?

15 MR. TEHRANI: No, your Honor. There are additional
16 locations.

17 THE COURT: All right. Would you then summarize and
18 point.

19 Q. Is there a stamp in there for Egypt?

20 A. Yes.

21 Q. For Dominican Republic?

22 A. Yes.

23 Q. For Russia?

24 A. Yes.

25 Q. For Ireland?

D7TPLES2

Tumulty - direct

1 A. Yes.

2 Q. Scotland?

3 A. Yes.

4 Q. That's all with that exhibit. In addition to travel, are
5 you aware of any other post-retirement hobbies of Mr. Baran's?

6 A. Yes.

7 Q. And what's that?

8 A. Golfing.

9 Q. And during the course of your participation in the
10 investigation, did you conduct any surveillance of Mr. Baran?

11 A. Yes.

12 Q. When was that?

13 A. On May 16th, May 30th and June 20th, I conducted
14 surveillance of him golfing.

15 MR. JACKSON: All right. Judge, I just didn't hear --

16 THE COURT: What year?

17 A. 2013.

18 Q. And how did Mr. Baran get around the golf course?

19 A. He drove a motor vehicle to the golf course. Then,
20 throughout play, he would drive a golf cart between holes.
21 During the holes of play, he would use the golf course as well
22 as walk.

23 Q. By golf course, you mean a golf cart?

24 A. Yes, golf cart.

25 Q. And did you observe him getting in and out of the golf

D7TPLES2

Tumulty - direct

1 cart?

2 A. Yes.

3 Q. And you observed him walking when he wasn't in the golf
4 cart?

5 A. Yes.

6 Q. Did you surveil him the entire time?

7 A. No. During the first time of play on May 16th, we stayed
8 there the entire time. There were points where he would be out
9 of view. There would be some golf holes that were out of view,
10 but he continued along what would have been the golf course.

11 The second point, we discontinued the surveillance for
12 approximately 45 minutes to an hour due to him being out of
13 view. We left, we came back, and he followed and continued
14 along the golf course.

15 The third time we stayed for the first three holes,
16 and then he would have been out of view; so we discontinued the
17 surveillance at that point.

18 Q. And on the first and second time, did you see him both tee
19 off on the first hole and complete the 18th hole?

20 A. Yes.

21 Q. And from the first hole to the 18th hole, how long was
22 that, approximately?

23 A. Approximately five hours.

24 Q. And what did he do before he started on the first hole?

25 A. Before he started on the first visit, he went to the

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Tumulty - direct

1 driving range and practiced driving with the golf club. Then
2 he went to the putting area and practiced putting.

3 The second time he went to the -- just to the driving
4 range and practiced on driving golf balls with the golf club.

5 Q. And so how long in total, if you include that pre-first
6 hole activity?

7 A. It would be approximately a half hour prior to starting; so
8 about five-and-a-half hours in total.

9 Q. Now, you testified that he drove to the golf course?

10 A. Yes.

11 Q. Where did he park?

12 A. The first two times we saw him arrive in his vehicle, and
13 he parked in a handicapped parking spot. The third time his
14 vehicle was already parked in the handicapped parking spot, and
15 he was in the vehicle. We watched him exit the vehicle.

16 Q. Did you observe whether or not he had a handicapped --

17 MR. DIRKIN: Can we have some foundation for the "we"?

18 A. Me and a fellow agent.

19 Q. Did you observe whether Mr. Baran had a handicapped parking
20 sticker on his car?

21 A. Yes.

22 Q. And did he?

23 A. Yes. He had a handicapped parking sticker that was in the
24 rear-view mirror inside his vehicle.

25 Q. And did you observe Mr. Baran carrying his golf clubs at

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Tumulty - direct

1 any point?

2 A. Yes, I did.

3 Q. And when was that?

4 A. He took the golf clubs out of his vehicle, carried them on
5 his shoulder at the beginning, after he arrived.

6 Q. And then at the end, did you observe him again?

7 A. Yes. The first two times we saw him complete play, and he
8 carried the bag over his shoulder and put it into his vehicle.

9 Q. And did he have any help carrying his bag?

10 A. No, he did not.

11 Q. At any point during any of your observations of Mr. Baran,
12 did he appear to you to be in any pain?

13 A. No.

14 Q. Did you or other agents who were with you take any videos
15 during your surveillance?

16 A. Yes.

17 Q. On all three occasions?

18 A. Yes.

19 Q. And have you reviewed those videos?

20 A. Yes.

21 Q. And have you reviewed clips of portions of those videos?

22 A. Yes.

23 Q. And do those videos and clips fairly and accurately depict
24 what you observed?

25 A. Yes.

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Tumulty - direct

1 Q. I'm showing you four CDs, Government's Exhibits 800, 800A,
2 801 and 801A through E. Do you recognize those?

3 A. Yes.

4 Q. And what are they?

5 A. They are videos of Ostap Baran golfing.

6 Q. And how do you recognize those disks that are in front of
7 you?

8 A. I recognize them because I dated and initialed the videos,
9 the CDs of the videos.

10 Q. After you viewed the videos?

11 A. Correct.

12 MR. TEHRANI: Your Honor, the government offers the
13 four CDs marked as Government Exhibit 800, 800A, 801 and 801A
14 through E.

15 MR. JACKSON: No objection.

16 THE COURT: Admitted without objection, but I'm not
17 going to allow the playing. It's cumulative. Move on.

18 MR. TEHRANI: Can I have just one second.

19 (Government's Exhibits 800, 800A, 801 and 801A through
20 E received in evidence)

21 MR. TEHRANI: Your Honor, may we approach on this
22 issue?

23 THE COURT: Yes.

24 (Continued on next page)

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Tumulty - direct

1 (At the side bar)

2 MR. TEHRANI: Your Honor, we've never showed any
3 videos or pictures of Mr. Baran golfing in any way. Special
4 Agent Tumulty testified to what he saw. The picture is worth a
5 thousand words.

6 THE COURT: The jury will have the pictures if they
7 want to see them. That's another concern which I did not
8 articulate here. You have gone through an inordinate amount of
9 testify concerning Mr. Baran. Now, I recognize that he was one
10 of the listed co-conspirators, but he also happens to be
11 Miss Baran's husband.

12 You didn't go into this kind of detail about
13 Mr. Supper, Mr. Ellensohn, any of the other co-conspirators.
14 There is a point in which it appears that, by going into this
15 kind of detail about Mr. Baran, you're going to prejudice the
16 jurors' view about Miss Baran. So I think, at some point, you
17 have to cut it off. You don't need to show video of him
18 golfing, if you already have the video, you have the testimony
19 of the agent who saw him, and I think it's just going to be
20 prejudicial at this point unnecessarily so.

21 MR. DIRKIN: Judge, we're talking about a couple
22 minutes of clips.

23 THE COURT: It doesn't matter. I've ruled. If the
24 jury wants to see it, they have the access to it. Okay?

25 MR. JACKSON: Judge, would you consider a limiting

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Tumulty - direct

1 instruction in this regard?

2 MS. FRIEDLANDER: No, this is direct --

3 MR. JACKSON: Can I finish?

4 MS. FRIEDLANDER: Yes.

5 MR. JACKSON: Wow. Judge, with respect to the
6 testimony that we talked about with Mr. Baran, I think that it
7 does have an overly prejudicial effect. I think that a
8 limiting instruction would be appropriate in light of that, in
9 light of conclusions and inferences that the jury can draw
10 unfairly that this is conduct that is ascribed to Ostap Baran,
11 and it's obvious why the government is doing this. And I think
12 that to the extent that it could confuse and mislead the jury,
13 it might be appropriate for your Honor to instruct the jury in
14 that regard.

15 MR. DIRKIN: The problem that we have, a related
16 problem, I think it's pretty prejudicial to us that they're
17 putting in evidence of Ostap Baran's playing golf in 2013 when
18 he got the disability way back when and, I mean, that's really
19 attenuated to us.

20 THE COURT: Okay. Miss Friedlander, you had a point?

21 MS. FRIEDLANDER: Your Honor, the evidence of her
22 husband's fraud is directly relevant to Miss Baran's knowledge
23 that this is all a fraud and her knowledge.

24 THE COURT: I'm not disputing all that. I'm just
25 saying, at some point, it is unduly prejudicial.

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Tumulty - direct

1 MS. FRIEDLANDER: I understand that, but as to a
2 limiting instruction, it's completely inappropriate. This is
3 direct evidence of her knowledge and intent. I'm going to
4 argue that in closing that's part of the reason we're
5 presenting --

6 THE COURT: We don't to have the jury seeing this for
7 that purpose.

8 MS. FRIEDLANDER: I understand.

9 (Continued on next page)

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Tumulty - direct

1 (In open court)

2 MR. TEHRANI: Special Agent Tumulty --

3 THE COURT: Continue.

4 BY MR. TEHRANI:

5 Q. We're not going to display the video at this time, but does
6 the video depict some of the things you described?

7 A. Yes.

8 Q. Including Mr. Baran golfing?

9 A. Yes.

10 Q. Swinging his club?

11 A. Yes.

12 THE COURT: Asked and answered.

13 Q. Carrying his bags?

14 A. Yes.

15 THE COURT: Asked and answered.

16 Q. Tying his shoes?

17 A. Yes.

18 MR. TEHRANI: No further questions, your Honor.

19 THE COURT: Mr. Ryan?

20 CROSS-EXAMINATION

21 BY MR. RYAN:

22 Q. Special Agent, you joined this investigation team in
23 December of '12; did I understand you correctly?

24 A. Correct.

25 Q. And that would be including Agent Cuocci as part of the

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Tumulty - cross

1 team, correct?

2 A. Correct.

3 Q. And you've been sitting here during this entire trial?

4 A. Correct.

5 Q. You've been following all the evidence in this case that's
6 been presented before this jury?

7 A. I have sat here for the majority of the trial.

8 Q. And all of the Joseph Rutigliano application forms and
9 things that are in the file, the jury already heard that, you
10 were here to watch that, correct?

11 A. I have watched the majority of the trial.

12 Q. Can you tell us why -- Can you add anything to what the
13 jury already has in evidence?

14 MR. TEHRANI: Objection, your Honor.

15 THE COURT: Sustained.

16 MR. RYAN: Could you put 719 up, please.

17 Q. And there was a continuing disability report marked as 719;
18 do you recall that?

19 A. Yes.

20 Q. Okay. Now this was a report that Mr. Rutigliano signed and
21 submitted to the RRB on or about March 11 of 2011, correct?

22 A. Yes, it's signed March 11, 2011.

23 Q. Okay. And it was in response to a letter of March 2, 2011,
24 Dear Mr. Rutigliano, correct, by John East, the district
25 manager in New York City?

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Tumulty - cross

1 A. I don't -- I don't see that letter.

2 Q. Well, let me show you 719. The papers are double-sided; so
3 maybe that's why you might have missed it.

4 A. Okay.

5 Q. Okay? Now, this inquiry, to which Mr. Rutigliano
6 responded, was sent by the Railroad Retirement Board, correct?

7 A. The letterhead says United States of America Railroad
8 Retirement Board.

9 Q. By John East, the district manager of New York, correct?

10 A. That's the name that's written below the letter.

11 Q. And at that time, the investigation, the criminal
12 investigation was ongoing, but you were not part of it,
13 correct?

14 A. I was not a part of the investigation at that time.

15 Q. Okay. And can you tell the ladies and gentlemen of the
16 jury whether this request for a continuing disability report
17 was issued by the Railroad Retirement Board in the ordinary
18 course of business?

19 MR. TEHRANI: Objection, your Honor. Relevance. He's
20 also testified he was not part of the investigation at the
21 time.

22 THE COURT: Sustained.

23 Q. So there's someone at the Railroad Retirement Board who
24 could tell us the circumstances --

25 MR. TEHRANI: Objection.

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Tumulty - cross

1 Q. -- under which in form was sent?

2 THE COURT: Sustained.

3 Q. You're not able to offer this jury anything concerning
4 the --

5 MR. TEHRANI: Objection.

6 THE COURT: Sustained. Sustained. Asked and
7 answered.

8 Q. Now, you didn't have to do a surveillance on a golf course,
9 as you did with Mr. Baran, concerning Mr. Rutigliano because
10 the New York Times had already taken the video, correct?

11 MR. TEHRANI: Objection.

12 THE COURT: Sustained.

13 MR. RYAN: No further questions. Thank you.

14 CROSS-EXAMINATION

15 BY MR. JACKSON:

16 Q. Sir, I'd like to ask you -- I want to talk about the trips.
17 You said that you -- I guess, Mr. Baran and Miss Baran, they
18 went traveling to various places. You testified to that,
19 right?

20 A. They were registered as being booked for travel, according
21 to the records.

22 Q. And you're not at all suggesting to this jury that it's a
23 crime to go to Egypt, are you?

24 A. Not to my knowledge.

25 Q. Is it a crime, to your knowledge, to go to Italy?

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Tumulty - cross

1 A. If they're allowed to travel, to my knowledge, it's not a
2 crime.

3 Q. Was there anything in your information that suggested that
4 they were not allowed to travel, sir?

5 A. During those dates, no.

6 Q. And with regard to Dominican Republic, for example, to your
7 knowledge, is it a crime to go there?

8 A. Not to my knowledge.

9 Q. And do you have any idea whether or not they have any
10 children, Mr. Baran and Miss Baran? Any idea of that?

11 A. I believe she stated at one point that she did not have
12 children.

13 Q. And do you know how long it took them to save for the trips
14 during their retirement -- that they took during their
15 retirement, any idea?

16 A. I don't know how long they saved.

17 Q. Any idea whether they had any accounts relating to
18 traveling when they retired, any idea, sir?

19 A. I know they had bank accounts. I don't know if anything
20 was designated for travel.

21 Q. And with regard to the bank accounts, did you find pockets
22 of stolen money in bank accounts?

23 MR. TEHRANI: Objection.

24 THE COURT: Sustained.

25 Q. Now, with regard to the actual golfing, I think you spent a

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Tumulty - cross

1 little bit of time at the golf course, right?

2 A. I conducted surveillance three times.

3 Q. Now, the three times, could you give us the dates again
4 that you went to the golf course to conduct the surveillance,
5 please?

6 A. May 16th, 2013; May 30th, 2013; June 20th, 2013.

7 Q. Okay. And just give us a sense of the dates apart that
8 those are, if you can. How many dates apart were they?

9 A. Between the first and second, two weeks; and then the
10 second and third, about four weeks.

11 Q. Okay. Now, sir, in between that time --

12 A. Three weeks, sorry.

13 Q. Three weeks. In between that time, did you have any
14 surveillance of Mr. Baran playing golf between the dates of
15 May 13th and the two weeks to May 30th, any surveillance?

16 A. I did not conduct surveillance during those dates.

17 Q. And do you have any information as to whether he did play
18 golf during those times, sir?

19 A. I believe he was registered online to have being played
20 golf on some dates in between. I don't have the dates offhand.

21 Q. Well, tell us the dates.

22 A. I don't have the dates.

23 Q. How often did Mr. Baran play golf? How often?

24 A. He registered frequently for Thursdays to play golf.

25 Q. What is frequently Thursdays? Is that every week?

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Tumulty - cross

1 A. Not every week. I'd say, on average, maybe two out of
2 three weeks.

3 Q. So he played golf, what, a couple times a month?

4 A. For those dates that I know of.

5 Q. What about other dates?

6 A. And probably it would be more than that. I would say maybe
7 three times a month.

8 Q. So three times a month. So you'd agree with me there's 30
9 days, about, in a month, right?

10 A. 30 to 31 days in a month.

11 Q. And of the 30 to 31 days in the month, you're telling the
12 jury Mr. Baran was playing golf, right?

13 A. That I've seen him register for.

14 Q. And, in fact, just with regard to him playing golf, sir, do
15 you have any indication whether or not a doctor suggested he
16 might play golf to feel better?

17 A. I would not know.

18 Q. And just on the -- along those lines, I know you went to
19 see him play golf, and I want to get more into that, could you
20 tell the jury the surveillance you conducted of Mr. Baran going
21 to the gym?

22 A. I did not conduct surveillance of him going to a gym.

23 Q. Did you ever see him going to a gym?

24 A. I never saw him at the gym.

25 Q. What about him jogging outside? How about running in the

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Tumulty - cross

1 outdoors, did you ever see him do that?

2 A. I never saw him run outdoors.

3 Q. What about lifting weights in his backyard, any
4 surveillance of that?

5 A. I never conducted surveillance at his house.

6 Q. So essentially, the only activity that you're suggesting to
7 the jury that you observed was this golf playing, right?

8 A. The three times in question we went to the golf course, and
9 two times we saw him arrive and one time he was already
10 present.

11 Q. And I think you told Mr. Tehrani, in fact, that he was in a
12 golf cart; did you not?

13 A. For a portion of the time he was in a golf cart.

14 Q. And with regard to him getting around from hole to hole, I
15 think you told Mr. Tehrani that he was in a golf cart; is that
16 accurate?

17 A. Hole to hole, he took a golf cart.

18 Q. Do you have any idea of the weight of a club? Any idea,
19 sir?

20 A. Well, we had testimony earlier on that it was about a pound
21 to two pounds, right?

22 Q. And that's because you were sitting back there, as Mr. Ryan
23 asked you, observing the trial, right?

24 A. Correct.

25 Q. Now, if I could just ask. At any point, did the government

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Tumulty - cross

1 ask you to find out what, if any, medication Mr. Baran takes to
2 play golf? Did they ask you to inquire about that?

3 A. No.

4 Q. Did you independently think it might be significant, as
5 opposed to going through the charts, you know, where it says
6 pain sitting, standing -- You saw those charts a number of
7 times, right?

8 A. Correct.

9 Q. Did you independently think it might be important to
10 determine what, if any, medication Mr. Baran was on as he
11 played golf?

12 A. I never inquired about it.

13 Q. And with respect to his health conditions, did you ever
14 make inquiries of a Dr. Stephen Geiger?

15 A. I've never spoken to a Stephen Geiger.

16 Q. Did you speak to a Dr. Adam Stein?

17 A. I never spoke to Dr. Adam Stein.

18 Q. Did you ever speak to Dr. Frank Altebrando?

19 A. I never spoke to that doctor.

20 Q. Did you ever speak to Dr. James Inclendon?

21 A. I never spoke to that doctor.

22 Q. Did you speak to Dr. Frank DiMeo?

23 A. I never spoke to that doctor.

24 Q. Would it be fair to say, without going on to the various
25 doctors, additional doctors that Mr. Baran saw, did you request

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Tumulty - cross

1 any information from those doctors concerning his medical
2 condition?

3 THE COURT: Asked and answered.

4 MR. JACKSON: The additional doctors.

5 THE COURT: Asked and answered.

6 Q. Okay. So essentially, sir, just to be clear, as part of
7 your investigation, did the government at any point ask you,
8 for example, to inquire as to his handicap sticker? Did they
9 ask you to do that?

10 A. I observed his handicapped sticker and at the golf course.

11 Q. Did they ask you to pull the records regarding how it was
12 issued?

13 A. They asked a fellow agent. I did not go to request the
14 sticker.

15 Q. I'm sorry, my question is directed to you.

16 A. To me, I did not pull up any documentation regarding his
17 handicapped records.

18 Q. And with respect to the documentation, I'm also referring
19 to the agency that may have issued it. You understand that,
20 right?

21 A. Correct.

22 Q. And do you understand what supporting documentation, if
23 any, went into that application?

24 A. No, I do not know.

25 Q. And that's because you didn't check, right?

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Tumulty - cross

1 A. It was not my requirement to check.

2 Q. I'm sorry. You were required to investigate this case;
3 were you not?

4 MR. TEHRANI: Objection, your Honor.

5 THE COURT: Sustained.

6 Q. You were an investigator that was gathering information
7 relative to Mr. Baran's activities; is that not true?

8 MR. TEHRANI: Objection, your Honor.

9 THE COURT: Sustained.

10 MR. JACKSON: All right. Let's pull up 113. Let's do
11 it that way. Can we see Exhibit 113, please? Okay. And,
12 specifically, Mr. Baran's disability application, if we could
13 just go to that. Can we go to the next page. Okay.

14 Q. Now, we see Mr. Tehrani asked you questions about -- Let's
15 blow up the top there, right? You remember him asking you
16 questions about this, right?

17 A. Yes.

18 MR. TEHRANI: Your Honor, objection. Your Honor,
19 based on the sidebar, I did not ask any questions about the
20 application.

21 THE COURT: This information came in in summary form,
22 Mr. Jackson.

23 MR. JACKSON: And I'll summarize it too.

24 THE COURT: Summarize your question.

25 Q. So in summary, you see the information about the medical

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Tumulty - cross

1 conditions. You see all those, right?

2 A. In question 6?

3 Q. That's what I'm asking you about.

4 A. Yes.

5 Q. And because we're summarizing, can we go to the medication
6 section, please? Just keep going, please. And, in fact,
7 Mr. Tehrani asked you about the physicians. He directed your
8 attention to Dr. Lesniewski. You remember that, right?

9 A. He stated it and summarized.

10 Q. Did he direct your attention to the Dr. Barth that's also
11 there too?

12 A. What section is that under?

13 Q. Under attending physicians. Okay. Let's start here.
14 Jeffrey Kaufman in MRI. He didn't direct your attention to
15 that, did he?

16 MR. TEHRANI: Your Honor, this is misstating,
17 mischaracterizing the summary nature of it.

18 THE COURT: Sustained.

19 Q. Let's go to summary. Let's go to the attending physician
20 list on the application. Okay. There we go. All right. See
21 Dr. Barth?

22 A. In section B, Dr. Michael Barth, yes.

23 Q. You do see that?

24 A. Yes.

25 Q. And do you see above that where it indicates spinal

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Tumulty - cross

1 stenosis; do you see that?

2 A. Under the Dr. Lesniewski section, yes, spinal stenosis.

3 Q. Exactly. And I asked you about a series of doctors before;
4 you remember that?

5 A. Correct.

6 Q. And this is an additional doctor that I didn't ask you
7 about. Did you get records from Dr. Barth, sir?

8 A. I personally never obtained records from Dr. Barth.

9 MR. JACKSON: Let's go to the medication section, if
10 we can, please. Scroll down. Keep going. Right there.

11 Q. Okay. Just above that section there's a variety of
12 medication right there. If we could just blow that up. So
13 could you tell us what, if any one of those medications
14 Mr. Baran took on the three days in the two months that you
15 saw --

16 MR. TEHRANI: Objection, your Honor.

17 THE COURT: Sustained.

18 Q. Do you know whether or not Mr. Baran took any medication?

19 A. I did not see him take any medication.

20 Q. Okay. And you -- you didn't see him at the golf course
21 take it, correct?

22 MR. TEHRANI: Objection, asked and answered.

23 THE COURT: Sustained.

24 MR. JACKSON: And just one moment, Judge. I'm done.
25 Thank you, your Honor.

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Tumulty - cross

1 THE COURT: All right. Thank you. Mr. Dirkin?

2 CROSS-EXAMINATION

3 BY MR. DIRKIN:

4 Q. Special Agent Tumulty, this is a very big case for the FBI;
5 is it not?

6 MS. FRIEDLANDER: Objection.

7 THE COURT: Sustained.

8 Q. Well, how long have you been an agent?

9 A. I've been with the FBI approximately two years.

10 Q. Have you been involved in any cases that made the front
11 page of the New York Times?

12 MR. TEHRANI: Objection.

13 THE COURT: Sustained.

14 Q. Well, you testified that you and another agent, do I
15 understand correctly, spent three days surveilling Ostap Baran
16 on a golf course?

17 A. A portion of those three days we conducted surveillance of
18 him.

19 Q. How long did you spend surveilling him on that golf course
20 each time?

21 A. He was playing golf between the first and 18 hole
22 approximately five hours, and he beforehand was, you know,
23 practicing about a half hour before he started.

24 Q. You and another agent were assigned to do just that that
25 day, correct?

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Tumulty - cross

1 A. We were going to surveil him that day. We were assigned to
2 surveil him that day.

3 Q. Three times?

4 A. Correct.

5 Q. And that was when?

6 A. May 16th, 2013; May 30th, 2013; June 20th, 2013.

7 Q. That was shortly before this trial began, correct?

8 A. Correct.

9 Q. But you said you began -- became involved in the
10 investigation in 2012; is that right?

11 A. December 2012.

12 Q. Okay. The investigation itself, however, has been going on
13 since 2008, hasn't it?

14 MR. TEHRANI: Objection.

15 THE COURT: Overruled.

16 A. To my knowledge, 2008.

17 Q. It was first begun by the U.S. Attorney's Office in the
18 Eastern District --

19 MR. TEHRANI: Objection.

20 THE COURT: Sustained.

21 Q. -- of New York, wasn't it?

22 THE COURT: Sustained.

23 Q. Well, let's talk about -- Strike that.

24 So it wasn't until almost four-and-a-half years or
25 five years later that somebody decided that you should --

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Tumulty - cross

1 instructed you --

2 MR. TEHRANI: Objection.

3 Q. -- should go out and surveil the golf course?

4 THE COURT: Overruled.

5 Q. Right am I right?

6 A. They instructed me to surveil the golf course when I found
7 out that Ostap Baran was registered to play golf on that
8 particular day for the first time.

9 Q. Five years into the investigation, correct?

10 A. From '08 to 2013, it's approximately five years of the
11 investigation.

12 Q. Now, you testified to this note.

13 MR. DIRKIN: Could I have that note, please?

14 Q. Do you have the original there?

15 A. Yes.

16 Q. And that's what's up on the screen, right?

17 A. Correct.

18 Q. Now, you've been here through most of the testimony, right?

19 A. Correct.

20 Q. And you know that we've seen this already as part of
21 other -- another exhibit, correct?

22 A. Correct.

23 Q. Okay. And you're testifying today to highlight this to the
24 jury; are you not?

25 MR. TEHRANI: Objection.

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Tumulty - cross

1 THE COURT: Sustained.

2 Q. Well, you're a summary witness, correct?

3 MR. TEHRANI: Objection.

4 THE COURT: Sustained.

5 Q. This document was turned over to the FBI or the OIG in the
6 investigation by Island Sports Medicine in 2008; was it not?

7 A. I don't know the date.

8 Q. Roughly?

9 A. I don't know the date.

10 Q. Is there anything that would refresh your recollection?
11 You just don't know?

12 A. I don't know the date it was turned over.

13 Q. Okay. But you know that Island Sports Medicine -- you know
14 that this is part of records that were obtained from Island
15 Sports Medicine, where Dr. Lesniewski worked, correct?

16 A. It's part of the medical file for Dr. Lesniewski.

17 Q. And you know that either your agency, the FBI, or the OIG
18 or the U.S. Attorney's Office has had those records since
19 roughly 2008 or 2009, correct?

20 A. I don't know when those records were obtained.

21 MR. DIRKIN: Can we get a stipulation, Judge, rather
22 than waste time?

23 MR. TEHRANI: Your Honor, I'm not sure what the
24 relevance of this entire line of questioning is.

25 THE COURT: What's the relevance?

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Tumulty - cross

1 MR. DIRKIN: I'll follow up with it, Judge. I'll show
2 it to you.

3 THE COURT: Yes.

4 Q. This document was in the file when it was delivered to --

5 MR. TEHRANI: Objection.

6 Q. -- the FBI, correct?

7 THE COURT: Overruled.

8 A. When I reviewed the file, it was in the medical records.

9 Q. No one had removed it, had they?

10 A. To my knowledge, it was not removed. It was in the medical
11 file when I reviewed it.

12 Q. If it had been removed, you wouldn't have found it,
13 correct?

14 THE COURT: Asked and answered.

15 Q. Now, were you here during the testimony earlier regarding
16 this note?

17 A. I saw a portion of Mr. Supper's testimony.

18 Q. And were you here when Mr. Supper admitted that not all the
19 tests he asked for were given by Dr. Lesniewski?

20 MR. TEHRANI: Objection.

21 THE COURT: Sustained.

22 Q. Do you know, as you sit here, whether all those tests were
23 given?

24 A. I have no knowledge of the tests, if they were given or
25 not.

D7TPLES2

Tumulty - cross

1 Q. Do you get training in evidence when you're a special
2 agent?

3 A. Yes.

4 Q. When they teach you about incriminating documents, do most
5 people leave incriminating documents when they turn documents
6 over to the FBI?

7 MR. TEHRANI: Objection.

8 THE COURT: Sustained.

9 Q. Now, you were shown Government Exhibit 719 by Mr. Tehrani,
10 correct?

11 A. Yes.

12 Q. And he took you through several questions, correct?

13 A. Yes.

14 Q. He did not take you through question 3, did he? Can we
15 have that, please?

16 A. No, we did not discuss that earlier.

17 Q. That's because that says, "I have not discussed whether I
18 can work with my doctor," correct?

19 MR. TEHRANI: Objection.

20 THE COURT: Sustained.

21 Q. What does question No. 3 say?

22 A. "During the report period the doctor ... check only one
23 answer."

24 Q. And that answer is?

25 A. There is an X across the box for "and I have not discussed

D7TPLES2

Tumulty - cross

1 whether I can work."

2 Q. How many agents have been assigned to this case --

3 MR. TEHRANI: Objection.

4 Q. -- to your knowledge?

5 THE COURT: Overruled.

6 A. Two from the FBI and four from the RRB.

7 Q. Would I be correct in assuming that there weren't any
8 terrorists to watch the day you went --

9 MR. TEHRANI: Objection.

10 Q. -- to the golf course?

11 THE COURT: Sustained.

12 MR. DIRKIN: That's all I have.

13 THE COURT: Mr. Tehrani.

14 MR. TEHRANI: Your Honor may we be heard?

15 THE COURT: About what?

16 MR. TEHRANI: Proper scope of redirect, your Honor.

17 THE COURT: All right.

18 (Continued on next page)

D7TPLES2

Tumulty - cross

1 (At the side bar)

2 MR. WEDDLE: Your Honor, two things. One is, given
3 the cross-examination by Mr. Jackson, where he talked on and on
4 about the fact that Gus Baran was playing golf, and he may have
5 been taking medication, I believe that more than justifies our
6 showing the brief slips that we proposed to show in the direct
7 examination. And the reason is, the evidence of the
8 surveillance of Gus Baran is not just that he's playing golf,
9 it's what the video shows, and that's what we said before, a
10 picture is worth a thousand words.

11 What this video shows is his physical activities and
12 abilities juxtaposed to what he claimed in his application.
13 Like the fact that he couldn't bend, or it was hard for him to
14 dress himself. The video completely demonstrates that that is
15 false. And given all of the cross-examination questions that
16 Mr. Jackson asked, which is suggesting that this is just a day
17 at the golf course, it misses the point. And we should be
18 allowed to show those clips. That's the first thing.

19 The second thing is, Mr. Dirkin's questioning about
20 the number of agents assigned to the case and the length of the
21 investigation, I think, opens the door to putting in context
22 for this jury the scope of this investigation. Namely, the
23 fact that there are hundreds of people engaged in this fraud.
24 The FBI and the Office of Inspector General have conducted well
25 more than a hundred interviews in this case. They've

D7TPLES2

Tumulty - cross

1 prosecuted successfully a number of people. 20-something
2 people have pled guilty. Dr. Ajemian has pled guilty.

3 So to suggest that there's some kind of government
4 overkill here, and it's only targeting Mr. Baran and these
5 three defendants on trial, is completely misleading. And I
6 think we should be permitted to bring out the fact that we've
7 investigated many people, we've charged many people, many of
8 those people have pled guilty, and some of those people planned
9 to go to trial in February, which required a great deal of work
10 on behalf of the government team, and that's what people have
11 been doing.

12 THE COURT: All right. Mr. Jackson, now, let me say,
13 Mr. Jackson, I was surprised at the extent to which you -- I
14 tried to close the door on testimony concerning Mr. Baran. You
15 basically reopened it.

16 MR. JACKSON: Judge, that's fine. As long as you give
17 me creative license on my cross when they show it. I didn't
18 object when they were going to admit the exhibits. Remember, I
19 stood up and said no objection. I want them to see the video.
20 I'm just saying that --

21 THE COURT: All right. I'll let the government --

22 MR. JACKSON: I'm just saying that as long as when I
23 am on cross-examination am not restricted or restrained or
24 you've tied my hands behind my back on my questions when I go
25 through chapter and verse, sort of like the Rodney King video,

D7TPLES2

Tumulty - cross

1 you know. When it shows when he was doing this, was it proper?
2 When he was doing that, was it proper? So on cross, I just
3 don't want to be restrained. If your Honor is letting them see
4 it now, to not asking my questions of this witness regarding
5 his knowledge of what he was doing, that's it. I'm guided by
6 what you say. If you want to watch it, watch it, but allow me
7 to do my job.

8 THE COURT: I don't want to watch it. I was trying to
9 close the door, Mr. Jackson.

10 MR. JACKSON: Judge, you didn't close the door. You
11 said the jury could watch it at their leisure. The door was
12 never closed.

13 THE COURT: I'm talking about watching it here.

14 MR. JACKSON: It's up to you. I just want to cross.

15 THE COURT: Now, with regard to the questions
16 regarding the number of FBI agents, again, Mr. Dirkin raised
17 questions about the number of agents. The government can come
18 back and indicate or try to elicit why there were that number
19 of agents, but I am not going to allow a whole lot of testimony
20 about all of the people who have pled guilty and about how many
21 were prosecuted. Indicate why there were four agents as an
22 indication that this was a fairly sizable investigation. In
23 fact, Mr. Dirkin himself opened by saying this is a big case
24 for the FBI.

25 MR. DIRKIN: The only problem, Judge, is I think you

D7TPLES2

Tumulty - cross

1 sustained the objection to that; so, you know.

2 THE COURT: Yes, but then you asked him -- you
3 reopened the door again by asking him how many agents. I'm
4 trying to limit it.

5 MR. WEDDLE: In fact, your Honor --

6 THE COURT: Excuse me. Mr. Dirkin?

7 MR. DIRKIN: I think that I would have far less
8 objection had I been able to develop my cross along the lines
9 that I wanted to on that. I think if the government -- I think
10 the government is going to play with fire if they go into this,
11 but it's okay with me. I think it's going to open up doors
12 that they don't want, but that's fine.

13 THE COURT: All right. We'll try to limit it as much
14 as possible. All right? I'm going to call a break at this
15 point so we'll do this when we come back.

16 MR. JACKSON: Judge, and again, just to be clear.
17 With them showing the videotape, you will allow me the latitude
18 in cross to go over the videotape with this agent; is that
19 right?

20 THE COURT: Yes.

21 MR. JACKSON: Thank you.

22 THE COURT: But again --

23 MR. WEDDLE: Your Honor, I think the rules are still
24 going to apply. He's asking -- as long as he's acting on a
25 good-faith basis --

D7TPLES2

Tumulty - cross

1 MR. JACKSON: I've got plenty of good-faith basis.

2 THE COURT: All right. Thank you.

3 (Continued on next page)

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D7TPLES2

Tumulty - cross

1 (In open court)

2 THE COURT: We're going to take the morning break at
3 this point. It's 11:00. We'll return at 11:15.

4 (Recess)

5 (Continued on next page)

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D7tnles3

1 THE COURT: Bring in the jury, please.

2 (Jury present)

3 MR. WEDDLE: Your Honor, just briefly, we are nearing
4 the end of our case. After Special Agent Tumulty is done, I
5 think Mr. Tehrani has a couple exhibits to offer and then we
6 have a stipulation that we thought was agreed to and now there
7 seems to be a glitch in that. Mr. Ryan has raised an issue.

8 So we may need to at the very last minute figure out a
9 witness to come in and testify solely about the fact that in
10 order to obtain or work with any bank information
11 electronically in Long Island, the transmission has to go
12 through the waters that surround Long Island. Very simple, but
13 we may not be in a position to rest.

14 THE COURT: All right.

15 (Continued on next page)

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D7tnles3

(Jury present)

THE COURT: Thank you. Welcome back.

Mr. Tehrani.

MR. TEHRANI: Your Honor, if I may, just before I begin redirect, I just wanted to formally offer two exhibits that have been discussed, but I don't think were officially offered and received. The first is Government Exhibit 650, which is a CD containing UHC records.

The second is Government Exhibit 30, that was just in the stipulation we read this morning and includes the travel records that Special Agent Tumulty testified to.

THE COURT: All right. Is there any objection to these?

Hearing none, they are admitted without objection.

(Government's Exhibits received in evidence)

MR. DURKIN: I think we might have raised an earlier objection to one.

THE COURT: All right with the earlier objections as noted.

(Government's Exhibits 30 and 650 received in evidence)

REDIRECT EXAMINATION

BY MR. TEHRANI:

Q. Special Agent Tumulty, are you assigned to the terrorism squad?

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Tumulty - redirect

1 A. No.

2 Q. Are you assigned to a squad that investigates fraud?

3 A. Yes.

4 Q. And theft?

5 A. Yes.

6 Q. And stealing?

7 A. Yes.

8 Q. Including theft from the federal government?

9 A. Yes.

10 Q. Does the FBI take white collar fraud seriously?

11 MR. DURKIN: Objection. Leading.

12 THE COURT: Sustained.

13 Q. Special Agent Tumulty, remember when Mr. Durkin asked you
14 about terrorists and and it resulted in laughter from the
15 gallery?

16 A. Correct.

17 Q. Do you know whether any of the people sitting in the
18 gallery are retired Long Island Rail Road employees who
19 obtained disability benefits?

20 MR. RYAN: Objection.

21 MR. DURKIN: Objection.

22 THE COURT: Sustained.

23 MR. DURKIN: I have a motion.

24 THE COURT: Sustained.

25 Q. Special Agent Tumulty, do you know whether anyone sitting

d7tnles3

Tumulty - redirect

1 in the gallery is under indictment?

2 MR. DURKIN: Objection.

3 MR. RYAN: Objection.

4 THE COURT: Sustained.

5 MR. TEHRANI: No further questions, your Honor.

6 THE COURT: Mr. Ryan, did you rise?

7 MR. RYAN: No questions, thank you. It's tempting,
8 but I am not going to ask the question.

9 THE COURT: Mr. Jackson.

10 MR. JACKSON: No questions.

11 THE COURT: Mr. Durkin.

12 MR. DURKIN: If it was tempting for Mr. Ryan, it is
13 even more tempting for me, Judge, but I don't.

14 THE COURT: All right. Thank you.

15 MR. DURKIN: But I do have a motion later.

16 THE COURT: All right. Mr. Tehrani, we had talked
17 about those videos. Does the government have a view that?

18 MR. TEHRANI: We are not going to play them at this
19 time. We will show them in summation.

20 THE COURT: Thank you. You are excused.

21 You may step down.

22 (Witness excused)

23 THE COURT: Government.

24 MR. WEDDLE: Your Honor, right now we are at the point
25 that I mentioned to your Honor just before the jury came in.

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Tumulty - redirect

1 We could discuss it at sidebar or take a break at this point.

2 THE COURT: Let's discuss it at sidebar.

3 (At sidebar)

4 THE COURT: Mr. Weddle, is this all that is left of
5 the government's case?

6 MR. WEDDLE: Yes, your Honor. Two pieces of evidence
7 that we still would like to put in. One is a stipulation that
8 I mentioned briefly to your Honor. It's basically a
9 testimonial stipulation from I think three different sources
10 that traces the path that shows the interstate wire
11 transmissions that result from disability payments being
12 electronically deposited and processed through the Federal
13 Reserve Bank of New York, which processes them in New Jersey.

14 Then different banks connect into that information in
15 different ways, but we were going to prove this in one fell
16 swoop in a very straightforward way. We gave notice to all
17 defendants months and months ago about this.

18 Basically I spoke to the chief technology officer at
19 the FCC who obviously is very knowledgeable about how banking
20 information is transmitted in the world, and he said that in
21 order to communicate electronically with the Federal Reserve's
22 servers in New Jersey, if you are a customer in Long Island or
23 if you're spending money in Long Island or withdrawing it from
24 the bank account or checking your banking information, all of
25 those things are going to result in electronic transmissions

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Tumulty - redirect

1 accessing that information that started out on the server in
2 New Jersey.

3 He is going to say that, based on his knowledge, those
4 electronic transmissions almost invariably travel by wire
5 either under the waters surrounding Long Island, because, of
6 course, Long Island is an island, or attached to the bridges
7 that span that water or go through the tunnels. So it's
8 extremely straightforward.

9 The defense has known about this for months and
10 months. This stipulation has been outstanding for quite some
11 time. Just now Mr. Ryan has said he wants to speak to the
12 chief technology officer of the FCC, and he does not want to
13 stipulate to this information. So we had been prepared to rest
14 basically at this point, but what we thought would be a
15 forthcoming stipulation appears to have become problematic,
16 even though it is such a straightforward point.

17 The second item that we would like to put in,
18 hopefully by stipulation, is a document showing the amount of
19 money that Mr. Rutigliano received over the years in disability
20 payments and then at that point we would be prepared to rest.

21 So we can proceed however your Honor would like. I
22 would try to work out with Mr. Ryan whether we can solve this
23 problem that I didn't think was going to be an issue. And we
24 can try to solve the other issues. If we can solve them over
25 the lunch period, then we would be prepared to rest. If we

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Tumulty - redirect

1 can't solve them, we have to find a witness to testify to the
2 straightforward fact.

3 The person I spoke to personally is obviously highly
4 placed at the FCC, and when I spoke to him he was in
5 Washington, D.C. I don't know where he is today or whether he
6 is on vacation. It would take some looking to find who would
7 come into town to testify about this matter. But it almost
8 seems self-evident to me that in order for banks in Long Island
9 to have electronic information about money in people's
10 accounts, that if that information originates outside Long
11 Island, there has to be a wire transmission through or under or
12 over the waters that surround Long Island.

13 As your Honor knows, by law that means that those
14 transmissions go through the Southern District of New York,
15 because the water surrounding Long Island, or rather the water
16 in the Eastern District of New York is by law in the Southern
17 District of New York.

18 THE COURT: All right. Put that aside for a moment.
19 You indicated the second item relates to the disability
20 payments of Mr. Rutigliano.

21 MR. WEDDLE: Right.

22 THE COURT: Is this also contested?

23 MR. WEDDLE: I doubt it.

24 THE COURT: Is there an exhibit? Was that exhibit not
25 brought out before?

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Tumulty - redirect

1 MR. WEDDLE: This is the exhibit. We put one in that
2 was very similar to this. Actually I think it's multipiece
3 exhibit. But we put one in very similar to this related to Mr.
4 Baran, and you would read this in exactly the same way as with
5 Mr. Baran's exhibit, Government Exhibit 30. We had a
6 stipulation saying how to read this form. So I think based on
7 that stipulation we would just offer these exhibits and
8 everyone would be able to read them based on the stipulation
9 with Mr. Baran.

10 THE COURT: Mr. Ryan?

11 MR. RYAN: We have no objection to these payment
12 records. That is what they look like.

13 MR. WEDDLE: Yes. But the rate information.

14 MR. RYAN: The other information deals with venue. I
15 am going to make a suggestion for your Honor to consider. They
16 can rest and be subject to us ironing out a venue question. It
17 has nothing to do with the factual issues for the jury at this
18 point.

19 The proposition in this part of the stipulation I
20 question, and I asked if I could have a telephone conference
21 with someone from the office, it doesn't have to be the top
22 person, to explain to me why a credit in a New York bank, and a
23 New Jersey bank that is the Federal Reserve bank, that is where
24 the RRB checks go. You have someone on Long Island, such as
25 Mr. Rutigliano, getting a credit in New Jersey for their

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Tumulty - redirect

1 customer accounts, and then the bank within its system gives
2 credits to Mr. Rutigliano for the payments. That doesn't go
3 through the Southern District of New York in my opinion. I
4 signed a stipulation to that effect concerning the Federal
5 Reserve point. This stipulation is different. This adds that
6 somehow the process goes through the Southern District of New
7 York by reason of waters and wire communication. I simply have
8 to verify that. That is all I want to to do, is verify it.

9 MR. WEDDLE: It is very straightforward. It says from
10 a server in New Jersey there is no way to get electronically
11 from that to a person in Long Island except going through the
12 waters that are in the Southern District of New York.

13 MR. RYAN: I appreciate what he is saying. If I was
14 in a car, I could avoid the Southern District by going over the
15 Staten Island bridge.

16 MR. WEDDLE: That also would be in the Southern
17 District of New York, your Honor. The case law has said if you
18 drive over the bridges, over the Verrazano Narrows Bridge in
19 particular, that is a body of water that is in the Southern
20 District of New York by law. There are Second Circuit cases
21 saying even a flight path over the Narrows is in the Southern
22 District of New York. Mr. Ryan is simply wrong.

23 THE COURT: See if you can work it out. Get somebody
24 on the phone.

25 MR. RYAN: Right.

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Tumulty - redirect

1 THE COURT: If the meantime, the government can rest,
2 and come back after lunch and see if you have worked it out.
3 If you haven't, you can then rest subject to working this thing
4 out sometime before the defendants' case is completed. All
5 right.

6 MR. WEDDLE: Your Honor, why don't we just break and
7 then we will rest when this issue is completed rather than
8 resting conditionally.

9 THE COURT: If you wish to do so, that is fine.

10 Mr. Durkin, you had a motion.

11 MR. DURKIN: Well, can I just address this venue
12 issue.

13 THE COURT: Yes.

14 MR. DURKIN: I just want to make sure our objection to
15 the venue is properly noted. I am assuming that the person
16 will testify to he what he says. I disagree with the
17 government that it is a straightforward piece of testimony. If
18 you read this, it is one of the most convoluted things I have
19 ever seen. But we don't believe as a matter of law that that
20 satisfies venue. So I don't want there to be any inference by
21 agreeing to the stipulation that somehow we are agreeing to the
22 venue that they are talking about.

23 THE COURT: Let me ask, is the venue issue only with
24 regards to the wire transfer or all of the accounts?

25 MR. WEDDLE: It is only with regard -- I mean, I think

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Tumulty - redirect

1 that this stipulation also satisfies venue with respect to the
2 health care fraud counts, although I think there was also
3 evidence in the record that some of that was mailed.

4 THE COURT: It was mailed to 26 federal plaza, wasn't
5 it?

6 MR. WEDDLE: Yes. That is a different issue. For the
7 mail fraud counts, this stipulation has nothing to do with the
8 mail fraud counts. Those are based on the mailing to 26
9 Federal Plaza.

10 THE COURT: Right.

11 MR. WEDDLE: This stipulation covers both the wire
12 fraud counts. And the same proposition, which was
13 straightforward, covers the health care fraud counts, because
14 in order for a claim to be transmitted electronically from Long
15 Island to somewhere that is not in Long Island it has to go
16 through the waters surrounding Long Island because Long Island
17 is an island.

18 THE COURT: Right. OK.

19 See if you can work that out either on the phone or
20 through negotiations. If you don't want to rest, we will
21 adjourn for lunch and see if we can work it out before we come
22 back. All right.

23 MR. DURKIN: Judge.

24 THE COURT: Yes.

25 MR. DURKIN: The motion I want to make is for a

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Tumulty - redirect

1 mistrial regarding the fact of the repeated questioning about
2 whether there were people in the audience of retired Long
3 Island Rail Road workers. There was no basis for that, no
4 good-faith basis for that at all --

5 MR. JACKSON: Absolutely not.

6 MR. DURKIN: -- under any circumstances. And it
7 presumes they were the only people laughing, which they
8 weren't. That is my motion.

9 THE COURT: Thank you. I am not persuaded that is a
10 basis for a mistrial, so I am going to deny the motion.

11 MR. RYAN: I will share with you, Judge, that I
12 resisted asking whether or not Mr. Weddle's father was in the
13 room when the jury passes. I resisted that.

14 MR. WEDDLE: I am confident that my father was not
15 laughing at the totally improper questioning by Mr. Durkin.
16 But your Honor we would request that your Honor instruct the
17 members of the audience not to have that kind of outburst
18 during the questioning. They should sit here quietly or they
19 should leave.

20 THE COURT: Thank you.

21 MR. JACKSON: That can happen outside the presence of
22 the jury.

23 (In open court)

24 THE COURT: We are going to take the lunch break at
25 this point in order to allow for a number of issues that need

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Tumulty - redirect

1 to be straightened out before we resume.

2 So we will return at 2 o'clock. Enjoy the lunch. As
3 you go out, do not discuss the case among yourselves or with
4 anyone else on the outside or have any contact with anyone
5 involved in the case. If any of these things occur, you are
6 directed to inform the Court immediately and not to discuss it
7 with the other jurors.

8 Have a good lunch.

9 (Luncheon recess)

D7TMLES4

1 AFTERNOON SESSION

2 2:05 p.m.

3 (Jury not present)

4 THE COURT: Mr. Weddle, any resolution of the venue
5 issue?

6 MR. WEDDLE: Yes, your Honor. We resolved the issue
7 and all parties have entered into the stipulation that we have
8 proposed.

9 So at this point the government would just offer and
10 read that stipulation which we have marked as Government
11 Exhibit 1611 and then offer two documents that come in pursuant
12 to the stipulation that we read this morning, Government
13 Exhibit 1610, the two exhibits are Government Exhibit 570 and
14 571. And then at that point we intend to rest, your Honor.

15 THE COURT: Mr. Ryan.

16 MR. RYAN: Your Honor, I signed off on the
17 stipulation. I apologize for the delay. If there is anything
18 that has come up that's material and I change my mind, I will
19 ask the Court for permission. It's a question of signing the
20 stipulation. We don't concede venue. I just want to make that
21 clear.

22 THE COURT: The Court's permission to change your
23 mind, you said?

24 MR. RYAN: Yes. If I come up with something material
25 within the next day or so relating to that stipulation, I will

D7TMLES4

1 call it to the Court's attention and ask permission to
2 reconsider the application.

3 THE COURT: Thank you.

4 Now, Mr. Durkin had risen at one point to indicate
5 that there was some concern about an exhibit.

6 Mr. Durkin, do you recall this morning you left
7 open --

8 MR. DURKIN: They didn't put it in, Judge.

9 THE COURT: This morning there was some stirring in
10 the galleries at a point at which some testimony occurred. Let
11 me caution the members of the audience in the gallery and the
12 benches that it is very important to restrain any expression
13 from the galleries that might possibly bear upon the issues in
14 the case or somehow influence the jury improperly. The
15 consequences of any such expressions or outbursts can be very,
16 very severe.

17 Mr. Jackson, the government is going to be resting
18 momentarily. Is Ms. Baran prepared to proceed with testimony?

19 MR. JACKSON: She sure is, Judge. What I'm doing is,
20 I am going to immediately call her.

21 Now, there is a couple of issues to address. One is
22 the government had filed a motion in limine regarding a Ralph
23 Domenici regarding what they believe that he will be testifying
24 about. We can address that.

25 I noted that I received an e-mail. When I checked,

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1 there was an e-mail from last night at some point, a subpoena
2 requesting Ms. Baran to bring in all this information. I'm
3 certain the Court is not going to adjourn this trial to have me
4 go through that with Ms. Baran. I would argue that this is
5 completely untimely, Judge. The government had five years to
6 investigate the case, then asking me for records of her and her
7 husband, pictures that they took when they were in Egypt and
8 Italy. I don't know how material or relevant it is to the
9 case. In addition to that, they asked for a number of things,
10 pension files and other things that they have or had an
11 independent basis to get on their own.

12 And so I first am going to ask, Judge, that this Court
13 recognize that that certainly is untimely, it's unduly
14 burdensome. She would be required, in essence, to be a witness
15 against her spouse. I didn't even believe when I saw the
16 subpoena, Judge, from Sunday night. I don't know why I would
17 be getting a subpoena Sunday night on the eve of her testimony
18 today, so we may need to address that. But I'm completely,
19 when they rest, I'm prepared, my first witness will be
20 Ms. Baran and she fully intends to testify.

21 THE COURT: Two things.

22 Mr. Jackson, when we discussed the issue of defense
23 testimony on Friday, there was some question as to how many
24 witnesses you had and the proffer. Do you have others besides
25 Mr. Domenici?

D7TMLES4

1 MR. JACKSON: I do, your Honor. I believe there will
2 be a couple of others besides Mr. Domenici. Does the Court
3 want to hear an offer of proof regarding him, Judge?

4 THE COURT: Before we do that, how long do you think
5 you are going to need for the direct of Ms. Baran?

6 MR. JACKSON: We will probably take the rest of the
7 afternoon. She has got a lot of explaining to do. At least a
8 couple of hours. I don't know how it will come out or
9 whatever, but I'm thinking there is a couple of hours of
10 testimony, at least. We are going to be going through
11 government exhibits. She is going to be explaining her role
12 here. There are a number of things that I ask of her. I ask
13 that I be given latitude to do that.

14 She is a defendant in the case. She sat here
15 patiently and respectfully and with the appropriate decorum and
16 demeanor for weeks listening to things that, in her view, are
17 entirely untrue and she has a lot to say about it. She is
18 going to say a lot about it. I just need some latitude. But
19 it's going to take a while, Judge, and I don't want to rush
20 through her testimony.

21 THE COURT: If that's going to be the case, there is
22 no need to get into the issues of the other witnesses. To the
23 extent that there is any dispute concerning the scope of what
24 they would be testifying to, we can address those at a later
25 point.

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1 But bear in mind as to Mr. Domenici, based on what the
2 government has said in its motion, if the scope of what he is
3 going to be testifying to is what the government indicates it
4 is, based on your proffer, it appears that much of it is not
5 going to be permissible, but we don't need to address it at the
6 moment. I'll give you a proper opportunity to elaborate later
7 on.

8 MR. JACKSON: Thank you, Judge, very much.

9 THE COURT: Concerning Ms. Baran's testimony, again,
10 you are entitled to as much latitude as is appropriate. But
11 keep in mind that there has been an enormous amount of
12 testimony from many, many witnesses. To the extent that
13 Ms. Baran is going to be testifying to things that are already
14 on the record, undisputed, gone over ad nauseam, I would
15 suggest that you try to limit to matters that are new and that
16 gives things from her perspective and not going over factual
17 things like the date on a document that should not be disputed
18 or should not require any additional testimony.

19 MR. JACKSON: I agree, Judge. I just think, as you
20 rightfully mentioned, Judge, she gives a different perspective,
21 and I think the facts according to how they will be laid out
22 with Ms. Baran add a great deal of perspective than what the
23 government witnesses suggest the facts are. And so I will not
24 regurgitate, rehash, but there will be a number of exhibits
25 which she will explain what they really mean and there will be

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1 facts as to how they really are and there will be things that
2 took place and she will explain how they really happened. To
3 the extent that's relevant and probative, I'll be getting that
4 out through her and we will do it in the most efficient way
5 that we possibly could, Judge.

6 THE COURT: Thank you.

7 Mr. Weddle.

8 MR. WEDDLE: Your Honor, a number of things.

9 One is, it would be helpful, so we don't have to
10 rummage around in the carts in the midst of the testimony if we
11 knew what the exhibits are that Mr. Jackson intends to question
12 Ms. Baran about. That's the first thing.

13 The second thing is, we made a motion with respect to
14 Mr. Domenici because we got a single piece of 3500 material
15 from Mr. Jackson and it related to Mr. Domenici. We have had
16 no proffer of what the substance of the testimony would be from
17 any other witness and we have not gotten a single scrap of 3500
18 material for any other witness. I find it hard to believe
19 there are no notes, e-mails, memos or any other kind of
20 memorialization of what the substance of these people's
21 statements are. But we have nothing. As soon as we get a
22 proffer, it may be warranted to make additional motion
23 practice.

24 So we would request, number one, compliance with the
25 disclosure obligations regarding 3500 material and, number two,

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1 a proffer of what the substance of these people's testimony
2 will be.

3 THE COURT: That's what we asked for on Friday.

4 MR. WEDDLE: Yes, your Honor. We asked for it on
5 Friday. We have not gotten it. We still have not gotten it.
6 And Mr. Jackson still hasn't given any kind of proffer. He
7 hasn't turned over any additional 3500 material except for one
8 document from Mr. Domenici, which was filled with a number of
9 things that are plainly not permissible for him to testify
10 about. That's why we made the motion we made. But it doesn't
11 make sense to take this acting from the hip on these issues.
12 If there is 3500 material, we are entitled to it. We have not
13 gotten it. And if we can get a proffer of what the testimony
14 is going to be, we can resolve the proper scope of it and any
15 evidentiary issues that are appropriate to resolve ahead of
16 time rather than having objectionable, irrelevant questions
17 just being posed in front of the jury when it's clear that the
18 answer could never be admitted. That's prejudicial, your
19 Honor.

20 THE COURT: Thank you.

21 Mr. Jackson.

22 MR. JACKSON: Judge, a couple of things.

23 I understand that questions to the jury that hurt the
24 government's case are objectionable and irrelevant, according
25 to them. I just want to be very clear about two things. The

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1 first thing is that the government asked me for 3500 material
2 on Friday. I told them, and I think I represented to the
3 Court, that I received a fax from Mr. Domenici, which I
4 forwarded to them. He sent me another fax which I have not
5 forwarded to the government. That was done, I believe, this
6 weekend.

7 In terms of him sending me a fax to my office, I have
8 not been back to my office. But he has sent me another fax
9 which the government will get. Beyond that, there is no 3500
10 material, Judge. There is nothing else. I'm not hiding
11 anything from the government. I have spoken to witnesses. I
12 have not interviewed them. I have not had investigators
13 interview them. I'm not hiding the ball. I understand what my
14 obligations are.

15 THE COURT: Mr. Jackson, part of your obligation is to
16 come forward with a good-faith proffer.

17 MR. JACKSON: Judge, I just asked a minute ago before
18 I sat down whether you would like me to proffer for Domenici.
19 We will do that later.

20 THE COURT: We are not talking about Domenici. You
21 say that there are other witnesses and the government has no
22 clue who they are and what their role is or what they are
23 expected to testify about.

24 MR. JACKSON: I'm glad to tell you whenever you are
25 ready. I'm glad to tell you.

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1 THE COURT: The point is that it was asked for on
2 Friday and it should have been the subject of a written
3 submission to the government indicating exactly who, how many.

4 MR. JACKSON: I did that already, Judge. I indicated
5 to the government who the witnesses are and that they expect to
6 testify regarding their dealings with Ms. Baran and their
7 knowledge of the Long Island Railroad and knowledge of the RRB.

8 MR. WEDDLE: Your Honor, it's just not enough
9 information to permit an orderly presentation of what the
10 evidentiary issues may be.

11 THE COURT: What you just said could cover half of the
12 universe.

13 MR. JACKSON: You know what, Judge, for example, on
14 the issue of job descriptions, I thought that there would be no
15 objection to me admitting the job descriptions. Apparently,
16 the government objected, for whatever reason, to the admission
17 of job descriptions. I think it's important to explain to the
18 jury what the Long Island Railroad is, what it's about, types
19 of jobs people do, the types of functions they have, the type
20 of climbing and lifting and bending and twisting and turning
21 and pulling that they do. And certainly if there were matters
22 even that we could have stipulated to before, I don't even know
23 how necessary witnesses would be.

24 To the extent that I can't even have a stipulation as
25 to a job description that's readily available on the Internet,

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1 that certainly they have, the government has in their own
2 information, I don't know what else to do but call a witness
3 and have them tell us what they do. I think there is a
4 good-faith basis to do it.

5 On Mr. Domenici's testimony, when, again, your Honor
6 is ready, I'll fully proffer exactly what he is going to say.
7 I think it's relevant, it's probative, it's not objectionable,
8 and there is no need for this long-winded 3500 material because
9 it's about matters, I think, that the government already has
10 some knowledge of.

11 THE COURT: We need to make a reasonable estimate,
12 especially for the jury and for the Court, of how long or how
13 much longer this case is going to take. At this point I don't
14 have an idea whether you are going to be bringing in one
15 witness, Mr. Domenici, or Friday you mentioned that maybe it's
16 eight of them.

17 MR. JACKSON: Just to be clear, Judge, and again just
18 to give you the full picture, the government reached out to
19 me -- I initially reached out to them. E-mails are all there.
20 I don't want to speak out of school. If I do, they will
21 certainly correct me. I forwarded the information about Mr.
22 Domenici and also I think I received an e-mail Saturday or
23 Sunday saying I was paring down the eight to five. I was asked
24 a question. And not only did I do that, Judge, they asked me,
25 in what order? I said, well, it will probably be Ms. Baran,

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1 Mr. Domenici, and another witness, Mr. Jansen. I even told
2 them the order. But today, according to them, you know, I
3 didn't do anything. I didn't comply with anything. That's
4 exactly what happened.

5 And so, Judge, I'll tell you right now that there
6 probably will be from the eight witnesses, I told them five.
7 There may only be about three of those witnesses that I end up
8 calling, depending on what happens with Ms. Baran, Mr.
9 Domenici.

10 And regarding what their assumptions were, that he
11 would testify about with the 3500 material, that's because he
12 had strong opinions in the material he sent to me. He's not an
13 expert witness. I don't care about his opinion. I don't think
14 you do or the jury does or anyone else does either. But
15 because in the 3500 material, Judge, he had some opinions to
16 me, which I fully shared with the government, that doesn't mean
17 that that's the proper subject of his testimony. It means that
18 he feels strongly about certain things that are happening that
19 shouldn't be. That's all.

20 But with regard to your question, I think Ms. Baran
21 will be a couple of hours. I think Mr. Domenici will be a
22 couple of hours. I think Mr. Jansen will be 45 minutes. And
23 that may be it. I don't know what the crosses will be, either
24 Ms. Baran or of Mr. Domenici or Mr. Jansen, but I believe that
25 I should be done by tomorrow morning.

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1 THE COURT: One last observation. Then we are going
2 to bring in the jury. I don't know anything about Mr.
3 Domenici. I have not seen the proffer. But it strikes me that
4 a witness who is not an expert, he's not a party, he has no
5 role here of any material involvement, to say that that witness
6 is going to be testifying for two hours, Mr. Jackson --

7 MR. JACKSON: It might be, absolutely. He knows
8 Ms. Baran. He could attest to the nature of his contacts with
9 her. He could attest to her good standing, her reputation. He
10 knows her husband, who has been branded a criminal, who is
11 ripping the system off of disability. He could testify to the
12 interactions with her. He has been the general chairman. He
13 worked for Long Island Railroad for 30 years. He has been a
14 gang foreman. He knows the union issues. He knows a number of
15 other things. He can talk about job descriptions, the extent
16 to which those jobs require very physical intensive labor,
17 electricians, which Mr. Baran is, who the government has
18 branded a criminal, the extent to which that job requires
19 climbing and jumping and leaping and a lot more than golf,
20 Judge. I could assure you that. He is going to talk about
21 that. I think that's going to take a significant amount of
22 time to develop. I am going to have to lay an appropriate
23 foundation.

24 Of course, if I don't, with regard to his testimony on
25 job descriptions, the government will object and he doesn't

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1 know what he's talking about. He has no basis in knowledge.
2 He's not the proper party. He is. Because he knows the inside
3 and outs of the railroad.

4 He will also give testimony on the whole issue of
5 Metro North. Metro North attempted to become a part of the
6 Long Island Railroad as it related to certain unions that
7 wanted to join because of the benefits that Long Island
8 Railroad has. He was involved in those negotiations. He was
9 there. He sat at the table. He was on the executive
10 committee. And he will otherwise demonstrate that that whole
11 chart and statistical analysis comparing an apple to an orange
12 is a joke and he will tell why. And I think he has a basis of
13 knowledge of doing that because he has been doing it a long
14 time. He knows Metro North inside out, he knows Long Island
15 Railroad inside out. He can give testimony as to any
16 distinctions between the two and why statistical analysis is
17 really misleading here. It may take me a while to develop
18 because, again, if I don't, I don't want to be objected upon,
19 which I'm sure I will because it was an improper foundation and
20 this is not the guy. That might take me a long time.

21 THE COURT: Let's not delay the point. Let's bring in
22 the jury.

23 MR. WEDDLE: Your Honor, at some point before we break
24 for the day it would be nice to have a detailed proffer as to
25 all of the witnesses Mr. Jackson intends to call.

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1 MR. JACKSON: I can finish now, Judge.

2 THE COURT: No. We are not going to do it now. I
3 don't want to keep the jury waiting any longer. Send a memo or
4 an e-mail to the government laying out in writing what the
5 good-faith proffer is for all the witnesses other than
6 Ms. Baran.

7 Mr. Durkin.

8 MR. DURKIN: Judge, just briefly, I only want the
9 record to reflect -- this may be more appropriate before the
10 government begins its cross-examination of Ms. Baran -- as you
11 know, we moved for a separate trial. I would renew that. At
12 this point I want the record to reflect that we will be resting
13 and not putting in any evidence whatsoever.

14 THE COURT: Thank you.

15 MR. DURKIN: Other than the stipulations. The only
16 reason that we are waiting is we have two stipulations, maybe
17 three. I'm talking about the government's use of
18 cross-examination of Ms. Baran against Dr. Lesniewski. I want
19 to object to that in advance.

20 MR. JACKSON: Judge, would you like me to give the
21 exhibit numbers?

22 THE COURT: Yes. If you have exhibit numbers of
23 documents that you are going to be introducing or referring to
24 through Ms. Baran, we should have those ahead of time.

25 MR. JACKSON: Thank you, Judge.

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1 At this point I will say what the exhibits will be.
2 113A. In addition to 113A, the golf video of Mr. Baran, I
3 guess, playing golf. I will be alluding to that. I am not
4 sure what the exhibit number is. Exhibit 800, exhibit 803,
5 Exhibits B5A through B5Q, Exhibit 104A, Exhibit B1 through B4,
6 Exhibit 17, Exhibit 17D, which I guess I can offer.

7 MR. WEDDLE: We don't object to it. I think it's
8 called 17D for draft. We are not going to object to it.

9 MR. JACKSON: 114A, 114B, 114C, 114D. 1353, 108A,
10 108B, 108C, 108F, 108E, 108D, Exhibit 530, Exhibit 18B, Exhibit
11 14A, Exhibit 14B, Exhibit 18B, Exhibit 504, Exhibit 503A,
12 Exhibit 523, Exhibit 524, Exhibit 522, Exhibit 502B2, Exhibit
13 500C, Exhibit 500D, Exhibit 502B3, Exhibit 507, Exhibit 18,
14 Exhibit 502B1, Exhibit 502B4, Exhibit 527, 18A, 507, Exhibit
15 D2. Then there was a disability exhibit. I think this last
16 witness went over the amount of hours that Ostap Baran worked
17 overtime. If you can just refresh my recollection of what
18 exhibit number that is.

19 THE COURT: It has not yet been introduced.

20 MR. WEDDLE: Government Exhibit 30, I believe. I'm
21 sorry. I was wrong about that. 813.

22 THE COURT: Is that it, Mr. Jackson?

23 MR. JACKSON: That's it.

24 THE COURT: Are any among the ones that you've read
25 that are in dispute or are they already admitted.

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1 MR. JACKSON: Judge, I don't believe that the job
2 descriptions, which would be B5A through Q, I don't think those
3 are in evidence. B4 is not in evidence. Again, unless the
4 government at this point wants to stipulate to that.

5 MR. WEDDLE: Your Honor, I think Ms. Baran can
6 probably authenticate it and put it in evidence. The problem
7 is that she was served with a subpoena in 2008 and this
8 document was not turned over in response to the subpoena.

9 THE COURT: Which document?

10 MR. WEDDLE: B4, I believe. I don't know what the
11 date is on the document. There were a number of defense
12 exhibits at some point that Mr. Jackson gave us that we asked
13 Special Agent Cuocci on the stand whether these documents have
14 been turned over in response to a subpoena in 2008 and she said
15 no. So there may be a questionable provenance to some of these
16 documents to the extent they were created, supposedly created
17 before 2008 but were not produced in response to a grand jury
18 subpoena.

19 MR. JACKSON: Judge, my understanding is, Ms. Baran
20 ran a legitimate business for which she filed taxes. The
21 government showed the jury those taxes repeatedly. And those
22 taxes, I think the government showed the jury what were 2012.
23 If they were not produced in 2008, perhaps they didn't exist
24 then. They could cross-examine Ms. Baran on that. But she had
25 her business up and operational in 2009, 2010, '11, '12, and

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1 this is what she used with her clients.

2 MR. WEDDLE: Your Honor, I don't have these other
3 defense exhibits in front of me, so I don't know exactly what
4 they are.

5 MR. JACKSON: Judge, to be clear, these are exhibits
6 that we gave the government a while ago.

7 MR. WEDDLE: I'm not denying that, your Honor.

8 Your Honor, when we bring exhibits to court, defense
9 counsel have actually asked us to hand over a packet of paper
10 copies even though we have already produced them
11 electronically. I don't have the paper copies in front of me
12 because I didn't know this was the list of exhibits that he was
13 intending to offer.

14 THE COURT: That's why I asked before how many of
15 these exhibits are documents that have already been admitted.
16 Some of them are.

17 MR. JACKSON: Judge, the vast majority. There are
18 maybe three that are not in evidence.

19 THE COURT: I was trying to get to narrow that
20 precisely to that question, and so far you've only indicated B4
21 and B5A through Q.

22 Let's bring the jury in.

23 MR. WEDDLE: I have two different B4s.

24 Your Honor, logistically, often time after the
25 government rests there are motions by the defense. I don't

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1 know what your Honor's preference is in terms of taking another
2 break or doing a brief set of motions in front of the jury. We
3 could discuss it briefly now, just before we rest, and then
4 they could renew the motion as soon as we rest and it would not
5 take a lot of time in front of the jury.

6 THE COURT: Are there going to be any defense motions
7 after the government rests?

8 MR. RYAN: Yes, your Honor.

9 MR. DURKIN: Yes, your Honor. We move for a judgment
10 of acquittal under Rule 29.

11 THE COURT: Anyone else?

12 MR. RYAN: I just filed ECF a written motion and I
13 have a copy for the Court.

14 THE COURT: On what?

15 MR. RYAN: Rule 29.

16 MR. JACKSON: It's no surprise, same thing as it
17 related to Ms. Baran.

18 THE COURT: So far as the Court's understanding of the
19 evidence that has been presented so far and the standard that
20 applies on Rule 29 motions, I am persuaded that the motions
21 should be denied. There is, in the Court's view, more than
22 sufficient evidence for this case to proceed to the jury.

23 MR. DURKIN: Judge, just to be sure, is it all right?
24 I am never sure whether it has to be in writing or not. It's
25 my understanding we don't have to make that motion in writing.

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1 THE COURT: You do not. You just made that motion.

2 MR. DURKIN: That's sufficient?

3 THE COURT: That's sufficient.

4 Proceed.

5 You made the motion, Mr. Durkin and there is a court
6 reporter who memorialized the fact that you made such a motion.
7 It gives you the basis for whatever you may want to do with
8 this.

9 MR. DURKIN: Thank you. Hopefully nothing.

10 (Jury present)

11 THE COURT: Welcome back. Thank you. We apologize
12 for the late start. I hope we didn't cause an inconvenience
13 and thank you for your patience. You will find from this point
14 forward that as we get closer to the conclusion of the trial,
15 the latest stages, there is a lot more unpredictability.
16 Things occur that we cannot control as easily because they come
17 in unexpectedly and that causes some amount of unavoidable
18 delays. So we thank you for your patience.

19 Mr. Weddle.

20 MR. WEDDLE: Thank you, your Honor.

21 The government offers Government Exhibit 570 and 571
22 pursuant to the stipulation read this morning, which was marked
23 Government Exhibit 1610.

24 THE COURT: No objection. It will be admitted without
25 objection as stipulated.

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1 (Government's Exhibits 570 and 571 received in
2 evidence)

3 MR. WEDDLE: Your Honor, I would like to offer and
4 read a stipulation Government Exhibit 1611.

5 The stipulation says that it's stipulated between the
6 parties that if called as a witness, a representative of the
7 railroad retirement board would testify that railroad
8 retirement board disability annuities are paid electronically
9 by fed ACH, the Federal Reserve's centralized application
10 software used to process automated clearing house transactions
11 from the United States Treasury's account with the New York
12 Federal Reserve.

13 If called as a witness, a representative of the New
14 York Federal Reserve would testify that fed ACH transactions
15 are electronically executed on servers located in New Jersey;
16 that is, the transfer of electronic funds is made from the
17 payor's account at the New York Federal Reserve to the
18 recipient bank's account at the New York Federal Reserve. From
19 there, the recipient banks use different methods and routes to
20 communicate with the New York Federal Reserve Bank's server in
21 order to move the money electronically to the bank accounts of
22 the account holders at the recipient bank.

23 If called as a witness, Henning Schulzrinne, the chief
24 technology officer of the Federal Communications Commission,
25 would testify that regardless of the route by which wire

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1 communications travel from outside Long Island into Long
2 Island, because Long Island is an island, the wire
3 communications necessarily would have to travel through, under,
4 or over the water that surrounds Long Island. In particular,
5 regardless of the route by which communications travel from the
6 New Jersey server of the New York Federal Reserve Bank, in
7 order for the money or information about the money to be
8 accessed by a customer or a teller in Long Island, a
9 transmission would be required that crosses the waters
10 surrounding Long Island and enters Long Island. Transmissions
11 of banking information such as this in the New York City area
12 are almost invariably by cable. These cables either are under
13 the water surrounding Long Island or are attached to bridges
14 that go over the water surrounding Long Island.

15 With that, your Honor, the government rests.

16 THE COURT: The government has indicated that it
17 rests. It means that the government has concluded the
18 presentation of all of the evidence that it has sought to
19 produce in its direct case in order to meet its burden of proof
20 of satisfying all of the elements of the charges that it has
21 brought against the three defendants. I will go into questions
22 of burden of proof during my final instructions.

23 At this point, as I indicated in my preliminary
24 instructions, the defense may, but does not have to, present
25 any evidence. If any defendant chooses not to present any

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1 evidence, again, as I indicated in my preliminary instructions,
2 the fact that the defendant chooses not to present the case
3 cannot be used by you in any way to draw any negative
4 inferences against any such defendant.

5 If you recall, the preliminary instructions that I
6 gave you, which I will give again in greater detail, defendant
7 does not have to testify or present any evidence. The
8 government has the burden of proof at all times to prove guilt
9 beyond a reasonable doubt. And the fact that a defendant
10 chooses not to present any evidence cannot be used by you
11 against that defendant. Again, I will address these issues in
12 greater detail during my final instructions, but I will not
13 inquire whether any defendant either chooses to present
14 evidence or to exercise a constitutional right not to.

15 THE COURT: Mr. Durkin.

16 MR. DURKIN: Judge, there will only be a couple of
17 stipulations. Tomorrow we will have stipulations. Other than
18 that, we will rest.

19 THE COURT: Thank you.

20 Mr. Jackson.

21 MR. JACKSON: Judge, it is our intent to put on a
22 defense case, and we would like to begin that defense case,
23 with your permission, at this time.

24 THE COURT: Mr. Ryan.

25 MR. RYAN: Your Honor, Mr. Rutigliano will rest on the

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1 government's case, subject to one stipulation to be offered in
2 evidence.

3 THE COURT: Thank you.

4 In that case, Mr. Jackson, the floor is yours.

5 MR. JACKSON: Thank you, Judge. At this time the
6 defense calls the accused, Ms. Marie Baran.

7 MARIE BARAN,

8 a defendant, called as a witness on her own behalf,

9 having been duly sworn, testified as follows:

10 DIRECT EXAMINATION

11 BY MR. JACKSON:

12 Q. Ms. Baran, how old are you?

13 A. Sixty-five.

14 Q. Where were you born?

15 A. Born and raised in Queens, Springfield Gardens.

16 Q. How many years did you spend in Queens in Springfield
17 Gardens?

18 A. Almost 15.

19 Q. Are you married?

20 A. I am. To Ostap or, as we call him, Gus Baran.

21 Q. How long have you been married to Gus Baran?

22 A. October 10 will be 43 years.

23 Q. Where did you meet Mr. Gus Baran?

24 A. He is my high school sweetheart.

25 Q. What high school is that?

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Baran - direct

1 A. Well, in 1961, the great little neighborhood I grew up in
2 in Queens started to become industrialized. All the companies
3 wanted to be around the airport. We were right at the end of
4 the airport. I watched every plane that ever left JFK go over
5 my house; knocked over a few bricks on the chimney, too. But
6 now they had -- when they used to feed you on the airlines,
7 they had all the food companies wanted to be in that area and
8 all the freight companies, so it became industrialized. So my
9 mom and dad sold their house and moved us out to East Meadow,
10 Long Island.

11 Q. I want to talk about Gus Baran for a minute. Okay?

12 A. Um-hum.

13 Q. Now, you said that you married him in what year?

14 A. 1970.

15 Q. You've heard a lot of discussion about Mr. Baran and his
16 lack of a disability, can I put it? You remember that, right?

17 A. I have heard it.

18 Q. You sat there?

19 A. Yes.

20 Q. Now, I want to start you off with that.

21 MR. JACKSON: Would the government please play the
22 videotape of him playing golf, the one that you were going to
23 play before with your agent who was under surveillance,
24 watching and following.

25 MR. WEDDLE: Your Honor, there are a number of clips.

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Baran - direct

1 There is probably an hour plus long videotape. We can play any
2 of them. But it would be helpful to know which one he would
3 like.

4 MR. JACKSON: Any clip of him swinging a golf club on
5 the golf course.

6 Q. Ms. Baran, if you permit me this diversion, I want to get
7 back into you and where, again, you grow up and your job and
8 everything else.

9 But before I do, I want to focus you on your husband.
10 Okay. We are going to take a trip there.

11 A. That's fine by me.

12 (Video recording played)

13 Q. Do you recognize the person on the screen?

14 A. I bought him that hat.

15 Q. Who is that?

16 A. It looks like my Chi-Chi Rodriguez. It's not. It's Gus
17 Baran.

18 Q. Gus Baran, is he playing golf there or about to?

19 A. Looks that way.

20 Q. Could you tell the jury how often Mr. Baran plays golf?

21 A. He can only handle it about once a week. And not every
22 week.

23 Q. On any given month how many times is he out there on the
24 golf course?

25 A. Two or three times a month.

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Baran - direct

1 Q. Is your husband disabled?

2 A. He is. Unfortunately, he has very severe stenosis.

3 Q. Could you tell us what, if anything, he does with respect
4 to medication prior to him going to play golf?

5 A. I'm not crazy about it, but he takes two Tramadol, which
6 are an opiate that kills pain. He takes two Tramadol to go out
7 there. He takes them in the morning with his breakfast and he
8 takes two more at the ninth hole.

9 Q. How many holes is it to play golf?

10 A. Eighteen holes.

11 Q. When he is actually on the golf course, do you go with him,
12 or no?

13 A. No. I think it's a dumb game.

14 Q. Now, with respect to how he feels the day after him playing
15 golf, would you tell the jury about that?

16 A. He's in a lot of pain. He gets up and he complains about
17 his back and I go, what a surprise. But I encourage him to do
18 it because he has very little exercise. And stenosis, you
19 don't damage it further by being in pain. If you can go out
20 there and do it once a week, so you'll be uncomfortable the
21 next day.

22 Q. With regard to this condition that he has of stenosis, if
23 you know, does it require him, when he's not playing golf, to
24 be bedridden?

25 A. Oh, no, absolutely not. Actually, a body in motion, that's

D7TMLES4

Baran - direct

1 what the doctors tell him.

2 Q. Give us a sense of his activities generally when he's not
3 playing golf, as the jury sees this.

4 A. My husband is a shopaholic. He's at BJ's or Home Depot.
5 He will do stuff like that where it requires him to just walk a
6 little bit. He doesn't really have any other habits. I
7 shouldn't say bad habits. He doesn't really have any other
8 hobbies and that's why he takes on the pain to play golf.
9 That's all he does.

10 Q. To your knowledge, when he goes and plays golf, does he
11 walk from hole to hole or does he get there --

12 A. No, he can never do that. He actually had to leave a golf
13 course once because it was one of those golf clubs, fancy ones
14 in Florida, where they didn't have golf carts. He couldn't
15 play.

16 Q. With regard to his other activities, when he's not golfing,
17 and we could continue to play this, is that him swinging there?

18 A. Yes. He's a bit of a hacker, isn't he.

19 Q. With regard to activities, do you know if on a daily basis,
20 does he go to the gym?

21 A. No.

22 Q. Could you tell the jury whether or not he lifts weights?

23 A. Absolutely not. The only thing the doctors suggest to him
24 is, if he is up to it, he can use a bicycle, one of those ones
25 where you sit down, not a bicycle where you are leaning over.

D7TMLES4

Baran - direct

1 But contrary to what the doctor said here, my husband's pain is
2 worse when he is bending over. He sits in the bike that sits
3 down and your legs are outstretched. That's it.

4 Q. With regard to his other exercise, is he a runner of any
5 kind?

6 A. Oh, my, no.

7 Q. Have you seen him jogging around your neighborhood or doing
8 that?

9 A. No. As a matter of fact, he used to like to garden. His
10 father was a landscaper, and so he got a pretty good green
11 thumb. I can say that he used to make the backyard look
12 beautiful with flowers, but he can't do that anymore. But last
13 October -- last September, at the end of the season, he decided
14 to do a little gardening and he blew his back out so badly, the
15 pain was so bad that the doctor told him to take a bunch of
16 pills, muscle relaxers and what have you, lay down in bed for a
17 couple of days and take it easy. Those few days in bed
18 developed seven blood clots in his legs.

19 MR. JACKSON: If we can just go back to that last clip
20 where he was holding his golf clubs.

21 Q. Did you see him holding his golf clubs and the golf bag?

22 A. Um-hum.

23 Q. Have you seen him do that before?

24 A. Yes.

25 Q. And with regard to him holding the golf clubs, do you have

D7TMLES4

Baran - direct

1 any idea or sense of how heavy that is?

2 A. It's not very heavy. I can move it.

3 Q. As far as his chores around the house, what, if anything,
4 does he generally do?

5 A. You're serious?

6 Q. Yes. What does he do around the house?

7 A. He makes the bed in the morning because it's hard for me to
8 bend over.

9 I should preface that with, I just had major back
10 surgery six weeks ago. And prior to that, I couldn't bend over
11 at all.

12 He always makes the bed every morning. He is the last
13 one out, anyway. He makes the bed. That's about it.

14 Q. Was there a time in your relationship where he did do other
15 things around the home?

16 A. Oh, my God. He did all the landscaping. He did
17 everything.

18 Q. You see him there by the car, is that correct?

19 A. Yup.

20 Q. And what is he doing?

21 A. Tying his shoe.

22 Q. Have you seen him tie his shoe before?

23 A. He only wears high shoes on the golf course because he
24 can't really bend over comfortably to do that. Besides the
25 stenosis, he has got -- his left hip is bone on bone.

D7TMLES4

Baran - direct

1 Q. As far as his golfing activities, besides golfing, you say,
2 what, once every however --

3 A. Two, three times a month.

4 Q. Beyond that, does he engage in any other physical
5 activities?

6 A. He might spin me around the dance floor once or twice on a
7 Friday night because we always like to dance. But his left
8 foot goes numb after one or two dances and then he has to sit
9 down.

10 Q. As far as that issue is concerned, do you know whether or
11 not he is required otherwise to be bedridden? Something --

12 A. No. The doctor wants him to move, even if it causes him
13 pain.

14 Q. And when he's not playing golf, what are his other
15 activities around the home?

16 A. Because I couldn't, he did the food shopping.

17 Q. Now, I want --

18 THE COURT: Mr. Jackson, are you done with this video?

19 MR. JACKSON: Yes, I'm done with it, Judge.

20 Q. I want to show you, did there come a time, to your
21 knowledge, where Mr. Baran filed for a disability?

22 A. He did.

23 Q. And before I show you the application, can you just tell
24 us, what job, to your knowledge, did your hushed hold with the
25 Long Island Railroad?

D7TMLES4

Baran - direct

1 A. He was an electrician.

2 Q. What period of time was he an electrician with the
3 railroad?

4 A. From 1978 until 2003, 25 years.

5 Q. Did you become familiar with his job duties and
6 responsibilities?

7 A. Not from him, but from my own job, I saw the job
8 descriptions of an electrician. He would tell me some things
9 like, they had to walk down into a pit where there was a train
10 over them and they had to work with their hands in the air
11 fixing the train. That's absolutely the worst position for
12 somebody with stenosis to be in.

13 Q. What else beyond that?

14 A. He had to climb ladders, which is very painful for him. I
15 do all the bulb changing in the house now. He can't. He had
16 to crouch down under those trains and do repairs. He had to
17 work in very cold conditions. Even though he worked in the
18 shops, the shop doors were all opened because the constant
19 movement of trains in and out. So cold is also difficult for
20 stenosis.

21 Q. I am going to show you the disability application which is
22 in evidence, and I want to point out specifically, this is
23 Exhibit 113A and I'm looking at Bates stamp 125094.

24 There are a number of medications listed there. Do
25 you see that?

D7TMLES4

Baran - direct

1 A. Yes.

2 Q. Are you familiar with the fact that your husband takes
3 medications?

4 A. He does.

5 Q. Are the medications listed in Exhibit 113A consistent with
6 the ones that you've seen him take?

7 A. Yes.

8 Q. Have you become familiar with the purpose of these various
9 medications?

10 A. Yes, I have.

11 Q. The first one is Nexium. Do you see that?

12 A. Yes. That's for acid reflux.

13 Q. There is a dosage next to that. Do you see that?

14 A. Yes.

15 Q. The one under that is Celebrex. What is that for?

16 A. Celebrex is an anti-inflammatant.

17 Q. What does that do?

18 A. Well, it used to help in bringing down the inflammation in
19 his spine. But, remember, I said he got laid up and he had
20 blood clots. Well, because of those blood clots in his lungs,
21 that went through his heart and the good lord spared him. He
22 can't take any kind of an anti-inflammatant anymore because he
23 takes Coumadin to thin his blood so he won't get any more blood
24 clots.

25 Q. Is Coumadin listed there?

D7TMLES4

Baran - direct

1 A. No. Because this happened after this.

2 Q. This application was filed, to your knowledge, in 2003?

3 A. Three or the beginning of four.

4 Q. Thereabouts, some nine, ten years ago?

5 A. Right.

6 Q. And there is also Ultracet?

7 A. Ultracet is a painkiller that he used to take. Now he
8 takes Tramadol instead.

9 Q. Is Tramadol listed there?

10 A. No. When one stops working you try another one.

11 Q. Lipitor, what is that?

12 A. For his cholesterol levels.

13 Q. Is he still taking that?

14 A. That or a generic of it.

15 Q. And the other one, if you could pronounce it.

16 A. Lotrel?

17 Q. Yes.

18 A. I believe that's for his blood pressure and he probably is
19 taking a different one now because they change them every once
20 in a while.

21 Q. And Hytrin?

22 A. Hytrin is a water pill.

23 Q. In addition to the other medications that you said he now
24 takes, are there other medications beyond the ones listed from
25 nine years ago that you have personal knowledge as to him

D7TMLES4

Baran - direct

1 taking?

2 A. I don't think he takes -- after he retired he got diagnosed
3 with very bad sleep apnea. The blood oxygen level is supposed
4 to be 98. And when they tested him his oxygen -- blood oxygen
5 level was 88. It takes 85 to sustain life, according to the
6 doctor. He stopped breathing once every 27 minutes or 27 times
7 an hour he stopped breathing, something like that. Once they
8 diagnosed it, thank God, he had to use a mask to sleep at night
9 to prevent the sleep apnea. But I don't know if he takes any
10 medication for that as well.

11 Q. Now, I want to direct your attention to section 6 and list
12 various things that are hard to do. Do you see that?

13 A. Yes.

14 Q. Now, are you familiar with whether or not on a daily basis
15 prior to coming to court your husband takes any medication?

16 A. Oh, yeah.

17 Q. What does take?

18 A. Tramadol.

19 Q. What does that do?

20 A. It kills the pain in his back. It's an opiate.

21 Q. And what, if anything, does that do with respect to, if you
22 know, his ability to sit or walk or do any of the things listed
23 here?

24 A. It let's him do it without severe pain.

25 (Continued on next page)

D7tnles5

Baran - direct

1 Q. Ms. Baran, I want to ask you, regarding his doctors, are
2 you aware of whether or not he is under the care of several
3 doctors?

4 A. Oh, yes.

5 Q. Now, if I can, I want to go through -- do you know who
6 Dr. Geiger is?

7 A. Yes. Dr. Geiger, right after Gus retired, he had been
8 seeing Dr. Lesniewski, and I am not even sure if it was
9 Dr. Lesniewski who recommended it or not, but somebody
10 recommended the pain management specialist because, other than
11 surgery, there's really not a lot you can do for stenosis. The
12 doctors tell him that you can't have surgery until the stenosis
13 is so bad that you are starting to lose control over your
14 bladder or other bodily functions. Well, that is not a very
15 pleasant thought, but the surgery is so serious they don't want
16 to do it until that point.

17 MR. WEDDLE: Your Honor, I object to hearsay. I don't
18 know what her base of knowledge is for this.

19 THE WITNESS: OK.

20 THE COURT: Sustained.

21 A. But the bottom line is the best choice for him was that he
22 should go to a pain management specialist.

23 MR. WEDDLE: Same objection.

24 THE COURT: Sustained.

25 Q. Do you have personal knowledge as to whether or not your

D7tnles5

Baran - direct

1 husband goes to a variety of doctors?

2 A. Yes, he does.

3 Q. Have you been to doctors with your husband?

4 A. Absolutely.

5 Q. Have you seen the effects that any medications they would
6 prescribe have on him?

7 A. I do.

8 Q. Are you familiar with, when he goes to the doctors, the
9 nature of the treatment they do provide?

10 A. Absolutely.

11 Q. Moving on from Geiger, are you familiar with an Adam Stein?

12 A. Yes, Adam Stein was a hand specialist who did his carpal
13 tunnel surgery.

14 Q. How are you familiar with that?

15 A. Well, he couldn't do anything anymore with his hand because
16 the carpal tunnel was so bad from all the years of repetitively
17 screwing in plyers and -- all the small tools that an
18 electrician uses is repetitive actions. So he got carpal
19 tunnel and he went to Dr. Stein and they did surgery.

20 Q. Are you familiar with a Dr. Frank Altebrando?

21 A. Dr. Altebrando keeps my husband on his feet.

22 Q. What do you mean by that?

23 A. He is a chiropractor. Who uses a lot of heat and electric
24 impulse therapy to keep the blood flowing in his back. That's
25 what stenosis is all about. The blood can't get through to the

D7tnles5

Baran - direct

1 nerves.

2 Q. How often does he go see Dr. Altebrando?

3 A. It depends on how his back is feeling. Sometimes once a
4 week, sometimes once a month.

5 Q. Are you familiar with a Dr. James Aclendin?

6 A. Dr. Aclendin is also a chiropractor. We have been
7 fortunate enough to spend our last few winters in Florida. He
8 couldn't do without a chiropractor, so we found one down in
9 Florida.

10 Q. How often, when you are in Florida with your husband, does
11 he see Dr. Aclendin?

12 A. Well, in Florida he cheats a little bit and maybe plays an
13 extra day of golf once in a while, so his is back worse. So he
14 goes there every week.

15 Q. How often, when you are in Florida, just to be fair, does
16 your husband play golf there?

17 A. Definitely once a week, maybe an extra one or two in the
18 month. That's why his back hurts more, so he goes to the
19 chiropractor more.

20 Q. How long has he been being treated by Dr. Aclendin?

21 A. Two years I think it is. Two years ago, we went down two
22 years ago.

23 Q. How do you know Dr. Barton Cohen is?

24 A. Oh, yeah, Dr. Barton Cohen happens to be a cardiologist,
25 but because one of my cousin's kids works for him I have him as

D7tnles5

Baran - direct

1 my GP. He's my general practitioner, and he's also my
2 husband's general practitioner. He offered that, which was
3 very nice.

4 Now that my husband has this problem with the blood
5 clots, it has to be monitored by taking your blood test every
6 two weeks to see what your INR number is. That means that your
7 blood is not too thick or too thin. Dr. Cohen keeps track of
8 that.

9 Q. I won't go through all of the doctors, but just a couple
10 more if you would bear with me?

11 A. Yes.

12 Q. Dr. Carp. Who is Dr. Carp?

13 A. Dr. Carp is a pulmonary specialist. That's who discovered
14 that Gus has sleep apnea and who treats him for it. And I have
15 chronic obstructive pulmonary disease, so he also treats me.

16 Q. Are you familiar with Tom Priscio?

17 A. I'm sorry. I didn't hear your name.

18 Q. Tom Priscio?

19 A. Yes, the Italian kid. OK. He's a hearing aid specialist.
20 We both wear hearing aids. We have severe hearing loss.

21 Q. I am going to move off this momentarily, but before I do I
22 just want to show you Section 3 of this exhibit 113-A.

23 At the top of that exhibit it lists a number of
24 medical conditions. Do you see that?

25 A. I do.

D7tnles5

Baran - direct

1 Q. Does that fairly and accurately describe the medical
2 conditions that your husband has, or are there more or are
3 there less?

4 A. There's more.

5 Q. What more are there?

6 A. Right after he retired we discovered the sleep apnea. When
7 he hurt himself, when we got the blood clots, they discovered
8 the reason for the blood clots is he's missing a blood factor
9 in his blood, factor 5, that's why he's going to be on Coumadin
10 for the rest of his life.

11 His hip, just from wear and tear from having worked
12 and played all his life, his hip is wearing down on the left
13 side. He's probably going to need a hip replacement sooner or
14 later, so that's a problem. I think that's it.

15 Q. Just a couple more questions before moving off of your
16 husband.

17 A. OK.

18 Q. You have heard testimony about how people go getting all
19 these papers and then stop seeing doctors once they get their
20 occupational disability. We have already established that he
21 got this disability in 2003 or '4, is that right?

22 A. Yes.

23 Q. Between 2003 and the present day, ten years, has Mr. Baran
24 been under the persistent and regular care of any doctor?

25 A. I'm afraid so, a whole bunch.

D7tnles5

Baran - direct

1 Q. When you say a whole bunch, I mentioned a whole bunch to
2 you before, correct?

3 A. All the ones you mentioned, yeah.

4 Q. The ones I mentioned to you, to be clear to this jury, the
5 ones that I mentioned to you, has he seen any of those doctors
6 within the last ten years?

7 A. All the time, two or three, four times a year.

8 Q. Over the course of time after he retired?

9 A. Yes.

10 Q. With regard to the video that I showed you of your husband
11 playing golf, does that change at all your perception or your
12 view regarding your husband's disability?

13 A. That's ridiculous. The man does it in pain, and he does it
14 because it's the only enjoyment he takes in life, other than a
15 little, you know, planting a flower in the backyard. He can't
16 do anything anymore.

17 Q. Ms. Baran, you have also heard testimony regarding
18 overtime. Did you hear that?

19 A. Yes.

20 Q. And your husband working overtime? Did it come to your
21 understanding ever, if at all, during your relationship whether
22 or not overtime was something that he volunteered to do or was
23 forced to do, required to do or some of both?

24 A. I think you are hitting the nail on the head. It's some of
25 both.

D7tnles5

Baran - direct

1 MR. WEDDLE: Your Honor, same hearsay objection.

2 MR. JACKSON: I will lay a foundation.

3 THE COURT: Lay a foundation.

4 Q. I don't want to belabor the point. You have been married
5 42 years, correct?

6 A. Yes.

7 Q. Your husband was for 25 of those years working on the
8 railroad, is that right?

9 A. Yes.

10 Q. You lived with him all throughout the course of that time?

11 A. I have.

12 Q. You have seen him when he came home?

13 Is that a yes?

14 A. Yes.

15 Q. You saw him when he left?

16 A. I did.

17 Q. You saw him when he returned?

18 A. Yes.

19 Q. Were there instances when he came home later than he would
20 otherwise be expected to come home?

21 A. Yes.

22 Q. Did you acquire a knowledge or an understanding as to what
23 the reason was that he was --

24 MR. WEDDLE: Hearsay, your Honor.

25 THE COURT: Overruled.

D7tnles5

Baran - direct

1 THE WITNESS: I can answer that?

2 THE COURT: Yes.

3 THE WITNESS: Thank you?

4 A. The reason he was coming home late was because he was
5 working overtime.

6 Q. Did you acquire any knowledge, personal knowledge, as to
7 what the reason or basis was as to him working overtime?

8 A. Sometimes he would tell me, I'd been asked to work
9 overtime, and I am going to do it.

10 And I would say, you know, Are you feeling OK?

11 And he would say, Yeah, I am going to do it.

12 And he would work to make the extra money. There were
13 other times he would call me and say they need an electrician
14 on the property and I'm the only one available, I have to stay.

15 Q. Just as far as we've seen this Exhibit 813, I believe the
16 government showed you 813. They showed all of us 813.

17 I don't know how good your eyesight is, but do you see
18 where it says electrician there?

19 A. I do.

20 Q. These are some indications of overtime throughout some
21 period of time that your husband worked?

22 A. Yes.

23 Q. And you just gave testimony as to why?

24 A. Yes. Did you notice that they're all in eight-hour
25 increments?

D7tnles5

Baran - direct

1 Q. Explain that.

2 A. They don't have a choice. I am not a union official. I
3 don't understand this stuff. But the union's negotiated this,
4 and the company agreed to it. They don't work an hour overtime
5 or two hours overtime. When they ask them to work overtime
6 it's got to be for an entire shift of eight hours.

7 Q. All right. Now, I want to move from your husband,
8 Ms. Baran, if I might, to the trips that you took to Egypt, to
9 the Dominican Republic, to Italy. There were others, but I
10 just want to focus on that for now. May I?

11 A. You may.

12 Q. With regard to these trips, the jury may see it again, I
13 direct you to Exhibit 803. 803 there's number of indications
14 of you and your husband traveling.

15 Tell us about those trips that you took. You went to
16 Egypt, the government said, right? You went to Egypt, right?

17 A. Two weeks before the overthrow of the government.

18 Q. That would have been in -- that would have been when?

19 A. 2010 or '11. Maybe '11. I am not sure.

20 Q. Who paid for your trip to go to Egypt?

21 A. We did.

22 Q. Who paid for your trip to go to Italy?

23 A. We did.

24 Q. Who paid for your trip to go to the Dominican Republic?

25 A. We did.

D7tnles5

Baran - direct

1 Q. You mentioned you didn't have any children, is that right?

2 A. Yes.

3 Q. Was there any college fund that you needed to establish
4 that you worked for 40 years?

5 A. No. Other than the little bit I give to my godchildren.
6 Because when you don't have kids everybody makes you godmother
7 and godfather, so we had a bunch of those. We used to take
8 them skiing with us and do stuff like that, but we didn't have
9 the expenses of children that most people have, so we had a
10 little extra money that we could spend on travel.

11 Q. Did it ever come to your understanding that it was a crime
12 in this country to have a vacation?

13 A. I never assumed that.

14 THE COURT: That is over the top.

15 MR. JACKSON: Yes, Judge.

16 Q. There were other trips that you took beyond that?

17 A. We went to Alaska.

18 Q. Where else did you go?

19 A. Most of our trips were cruises. So one trip would take you
20 to several different countries. The trip to Egypt took us to
21 Italy, Greece, Turkey. It was ten days and we were on a ship,
22 and you would stop in a city for a day and see the sights.

23 The trips to Italy, my maiden name was Fattizzi. I am
24 an Italian. My family comes from the Bari, the Adriatic side
25 of Italy. I went there twice and never got to the Adriatic

D7tnles5

Baran - direct

1 side, so we finally made it there.

2 Q. Just with regard to those trips, at the time that you took
3 those trips with your husband, could you tell us whether or not
4 at the time that you were there he was climbing any ladders or
5 crawling underneath trains or doing anything of that nature?

6 A. The reason we take cruises is because they are not
7 physically demanding. You can do whatever you can do. Like I
8 said, I just had back surgery so I didn't do -- especially in
9 Egypt and Greece and that, there's a lot of hills, and we
10 didn't do it.

11 We used to send our friends up and say, Go take
12 pictures. We'll wait down here. You do what you can. We got
13 to see things, but we couldn't do, I didn't walk to the top of
14 the Parthenon in Greece. I couldn't do it. I sat down and had
15 a Slurpee and they did the walk up. My husband couldn't do it
16 either. But you do what you can do, and you still have a good
17 time.

18 Q. I want to direct you back now, if I can, to you. And I
19 want to talk about, before we diverted to Gus Baran and your
20 trips, if I can divert you back to the facts here.

21 With regard to you being born and raised in Queens,
22 you mentioned, I want you to tell us a little bit about your
23 employment background.

24 A. OK.

25 Q. What was your first job out of high school?

D7tnles5

Baran - direct

1 A. My first job out of high school, I took a temporary
2 position. That was supposed to last three or four months with
3 the U.S. Air Force right here in downtown Manhattan. That was
4 what encouraged me to take the civil service exam, because if
5 the job was going to become permanent I was going to need to
6 pass the civil service exam to keep it. So they sent me over
7 here to Vesey Street and I took the civil service exam and then
8 the job ended anyway.

9 We were in the heat of the Vietnam war at the time,
10 and the people I was working for were all pilots. They were
11 all called from the recruiting detachment I was working for,
12 they were all called to go to Vietnam. So the office pretty
13 much was dissolved.

14 Q. How long did you do that? How long did you hold that job?

15 A. My memory back that far, and that's a long time ago, maybe
16 it was three or four months, maybe five months. I can't
17 remember exactly. But it ended, and then I did a short period
18 of working for an oil company. And then I got a letter from
19 the Social Security Administration in Mineola, and they had
20 taken my name off the civil service list and they offered me a
21 position, which I accepted.

22 Q. I want to talk about that position with social services.

23 A. Social Security.

24 Q. Excuse me. Social Security Administration.

25 A. Yes.

D7tnles5

Baran - direct

1 Q. Could you give us the approximate year that you took that
2 job.

3 A. I believe that was in December of '66. That's what my date
4 was on my working papers anyway.

5 Q. How long did you stay there?

6 A. I stayed with the Social Security Administration 20 years,
7 a little over 20 years.

8 Q. What were your general responsibilities there?

9 A. I started out in Mineola as a receptionist, and very
10 quickly thereafter I became a clerk who worked in all the
11 different divisions in the office. They have survivor benefit
12 division, they have retirement benefit division, and they have
13 disability benefit division.

14 Ironically enough, I ended up in disability division.
15 I worked there for a long time. In about 1971, after we were
16 married, we were living out on the island in Farmingdale and --

17 Q. Long Island that is?

18 A. Pardon me?

19 Q. Long Island?

20 A. Yes. I decided to ask for a transfer to the Melville
21 office, which would have been closer to my home at that time.
22 I understood it had more advantages there, more opportunities
23 there. So I transferred there, and within a year or two, I
24 cannot remember exactly, I was promoted to the assistant to the
25 district manager.

D7tnles5

Baran - direct

1 Q. If I can ask you, were you a federal employee?

2 A. Yes, I was.

3 Q. As a federal employee, would you have been entitled to an
4 occupational disability?

5 A. No, oddly enough, federal employees are one of the few that
6 have occupational disabilities besides Railroad Retirement,
7 firemen and cops.

8 Q. Any time in your 20 years with the Social Security
9 Administration, did you apply for an occupational disability?

10 A. No, I did not.

11 Q. While you were working with the Social Security
12 Administration, did you learn about disabilities and other
13 types of retirement issues?

14 A. I did. I had to work in all the divisions so I learned
15 everything, a little bit -- a lot about every division before
16 you went on to another one.

17 Q. Did there come a time that you left that job?

18 A. Well, my last promotion was from the Melville office to the
19 assistant to the area director. The area director was the man
20 who supervised all 14 offices in that area on Long Island and
21 Queens. So he was the boss of all of the managers and he
22 supervised all those offices.

23 Q. When you were at the Social Security Administration?

24 A. Yes. And I was made his personnel financial management
25 assistant. He had four assistants in the office. One was to

D7tnles5

Baran - direct

1 know everything about SSI, the other one had to know everything
2 about SSA, which is Social Security -- forgive me for the
3 jargon -- and me, I was his financial management person. Then
4 there was another one who was just administrator.

5 Q. Why was it that you left?

6 A. Well, it was the best job in the world and he was the best
7 boss in the world. It was a very good experience in my life,
8 and we had a great working relationship in that office. He
9 used to call us the A team. And then suddenly, out of nowhere,
10 he decided to retire. His health was failing, and he decided
11 to retire in, I think it was December of '87.

12 He gave us about six months' notice and they told us
13 very quickly who was going to be his replacement. I didn't
14 like who his replacement was. I had worked not with him but
15 around him in my career, and I knew it wasn't going to be a
16 match made in heaven. So I started to look for another job.

17 Q. To that point in those 20 years, to that point, had you had
18 any issues with the job? Any disciplinary issues, any
19 suspensions, any problems?

20 A. Not at that point, no.

21 Q. How old were you when you left that job approximately?

22 A. 40.

23 Q. Had you had any arrests in your life to that point?

24 A. No.

25 Q. Any FBI agents come to your home to that point?

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Baran - direct

1 A. Never.

2 Q. Now, there did come a time, however, that you did leave for
3 the reasons you described. Where then did you go?

4 A. Ironically, everything happens for a reason in life. My
5 husband came home one night and said that one of the unions is
6 having a retirement seminar and he would like me to come with
7 him and listen to what his Railroad Retirement and Long Island
8 Rail Road pension benefits are. So we made a deal that he took
9 me out to dinner and I would go.

10 So we did. And we sat there for about an hour
11 listening to the pension manager from the Long Island Rail Road
12 tell us about the benefits that they had from the Long Island
13 Rail Road.

14 Q. Where was this?

15 A. Where was it?

16 Q. Yes.

17 A. It was in a little hall in Bellmore, I believe, close to
18 our house. There were people there who were very close to
19 retirement. We weren't. But they were very close to
20 retirement, and people started asking questions about Railroad
21 Retirement. And they wanted answers. And he kept saying,
22 Well, I think this is the answer, but I can't be sure because I
23 don't work for them.

24 Being me, I said, why don't you have somebody here
25 from Railroad Retirement to answer their questions? It seems

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1 like, you know, ridiculous to just keep saying tell them to
2 call Railroad Retirement.

3 He said, Well, they were supposed to send somebody,
4 but he got a promotion and was sent back to Chicago. There is
5 no manager on Long Island.

6 A light went off in my head, and out of luck the next
7 day I picked up the phone and I called the Railroad Retirement
8 Board in Manhattan.

9 I spoke to the manager there, and I told her who I
10 was, what my credentials were. She said she would love to
11 entertain an application from me, so I sent her my résumé.

12 The following week I went in for an interview and the
13 following week I was in Interlaken, Wisconsin. It was a very
14 whirlwind thing. I got hired and they sent me -- there was a
15 new employee training class that was starting on September 10,
16 and I remember it because that happens to be my birthday.

17 Q. You are talking about the Railroad Retirement Board, is
18 that correct?

19 A. I am.

20 Q. This job was a federal job with the Railroad Retirement
21 Board?

22 A. Yes. So I kept all my pension rights, just went to a
23 different federal agency.

24 Q. When you went to that federal agency, you mentioned this
25 session that you had in Wisconsin. What was that all about?

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Baran - direct

1 A. It was a training class for new hires and people that were
2 promoted into the position of contact representative. That's
3 who you might see if you went to a Railroad Retirement office.
4 I, of course, had a tremendous advantage over these people
5 because I had all my background in Social Security.

6 And Railroad Retirement and Social Security are very
7 much alike. Then again there's very much differences in their
8 benefits also.

9 Q. Now, before we go on about the job and the years that you
10 spent there, the specific things that you did, you mentioned
11 something about the similarities and the differences between
12 Social Security Administration and Railroad Retirement Board.

13 Could you just give us a general sense of what those
14 differences are.

15 A. Well, what I had to learn at Railroad Retirement is they
16 also pay out sickness benefits to people who work for
17 railroads.

18 Q. Who does?

19 A. For instance, Amtrak doesn't have any benefits at all,
20 unless it's -- if they go out sick, the only payment they get
21 is from Railroad Retirement. If they get unemployed because of
22 a reduction in force, they get their unemployment from Railroad
23 Retirement. So those were two things that I had never seen
24 anything about at Social Security.

25 Pretty much retirement benefits were the same, except

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Baran - direct

1 there is an exception in everything. Railroad Retirement has a
2 special 30-year rule, that if you put in 30 years of service at
3 any railroad industry, even if you do it in different places,
4 different railroads, once you have 30 years you can retire with
5 full benefits at age 60, no age reduction.

6 Anybody here who happens to be Social Security age
7 knows that if you were 62 and you decided to retire at Social
8 Security, you take an age reduction. They take off 20, 25, 30
9 percent based on how old you are. If they do 30 years at the
10 railroad, there is no reduction and they get it at 60, a big
11 opportunity for them, and so does their wife. So that's
12 something I had to learn.

13 Disability, I thought I knew it all, because I had so
14 much experience at Social Security. But the Railroad
15 Retirement Board is unique in that it has an occupational
16 disability. As I had said before, like firemen, policemen, if
17 you cannot do your job, you're occupationally disabled.

18 Well, that was totally different from anything I had
19 learned about the total and permanent rules that we had at
20 Social Security. They were very stringent.

21 Q. What's the distinction between the two? If you could just
22 briefly clarify the distinction between an occupational
23 disability on the one hand and a total and permanent disability
24 on the other?

25 A. They are night and day. I beg your pardon. I am Italian.

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Baran - direct

1 They are night a day. A total and permanent you really have to
2 be -- I mean, I have seen people with cancer denied on a total
3 and permanent because it wasn't stage 4. You have to be unable
4 to do any -- well, let's see. The actual definition, if my
5 memory will serve me, unable to do any kind of substantial
6 gainful activity at all. Period.

7 Q. Total?

8 A. I've seen disabilities denied, and part of the denial
9 letter says, We think you can use a broom and sweep. That's
10 how stringent Social Security is.

11 Q. But total and permanent disability?

12 A. Total and permanent. We at Railroad Retirement also had a
13 total and permanent. If you didn't qualify for occupational
14 disability, which required a minimum of 20 years of service at
15 any age, and ten years of service at age 60, if you didn't meet
16 that -- and you have to have a current connection, which is a
17 railroad word. It just means the last place you worked was a
18 railroad. You have to have a current connection, you have to
19 have a certain amount of years at certain ages. Once you meet
20 that, you have the legal right to file that application for
21 occupational disability.

22 No matter what anybody outside the Railroad Retirement
23 Board thinks of your condition, you have the legal right to
24 file an application, just like you have the legal right to go
25 into Social Security and file an application once you have the

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Baran - direct

1 age and you worked ten years. Nobody can stop you. It is your
2 right. You are legally entitled to ask for a decision.

3 Q. Is that something you learned as part of your training?

4 A. Absolutely.

5 Q. Now, as it relates to your job and what you did when you
6 were at Railroad Retirement Board -- first of all, you spent
7 how many years there?

8 A. 18 and a half.

9 Q. And in that 18-and-a-half-year period of time could you
10 just briefly describe for the members of the jury the job that
11 you had, your specific job function.

12 A. When I first came back from Wisconsin I was managing a
13 small office, they called it a base point, in Hicksville. I
14 had one employee.

15 So I was supervising that employee, I was running the
16 office physically, keeping it operational, and I was training
17 that employee on any new information that came in, any changes
18 in policy, any changes in law.

19 I was given instructions to find a new space for the
20 office. I hired another person. While we were still in this
21 little cramped quarters, I had another person hired;
22 supervising two people now.

23 Q. What year was this approximately?

24 A. I started with them in '87.

25 Q. OK.

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Baran - direct

1 A. So there was '88 and '89. Part of my responsibility in
2 those years, we were not instructed to ask a disability
3 applicant to bring in medical records. We were just told to
4 ask them what their condition was and did they have medical.

5 If they said no, we would just automatically send them
6 to a doctor who we had previously made a contract with to do
7 work for us.

8 Part of my job was to go out and sign those doctors
9 up. I had to have a cardiologist available, an orthopedist
10 available, and an otolaryngologist -- that is the guy who tests
11 your ears -- all that kind of stuff, because those were the
12 basic things that we were seeing more frequently.

13 Q. You had to sign them up. What do you mean by that?

14 A. I had to go out to their office, sit in their waiting room,
15 and ask them: Would you work for us? This is what we do. We
16 would like you to do an exam, and this is how much the agency
17 would pay.

18 I did that. I recruited some doctors, and we would
19 send them our clients out there to be treated, to be looked at.

20 Q. When you say clients, you mean applicants for disability?

21 A. Applicants, yeah. Uh-huh.

22 Q. You would send them to the doctors to be evaluated?

23 A. Exactly.

24 Q. That was part of your job role?

25 A. It was.

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Baran - direct

1 Q. Now, throughout that 18 years that you spent there, could
2 you tell us, what are some of the other job responsibilities
3 that you had?

4 A. Well, as they were able to assess my ability, they would
5 promote me to -- they would move the office to Westbury, gave
6 me two more employees, promoted me to district manager. That
7 means I was controlling an entire district. My district went
8 from the lighthouse on Montauk to the 59th Street -- not 59th,
9 what's the name? The tunnel in Astoria. I didn't have
10 Manhattan. I just went from Astoria out to there.

11 And the Railroad Retirement Board is really a board.
12 It's a three-member board. They actually are appointed by the
13 President of the United States.

14 Unlike most government agencies, they are under the
15 executive branch of government. They are really answering to
16 the President of the United States. Social Security has a
17 commissioner, Railroad Retirement doesn't. They have the
18 President of the United States.

19 Actually, if you'll forgive me for going on, we were
20 the blueprint for Social Security. Railroad Retirement came
21 first. Nobody knows that. Nobody even knows who we are if we
22 don't have to sit here and listen to it for two weeks. But we
23 were the blueprint for Social Security.

24 So there is a three-member board. One represents
25 management, the people who own the railroads; one represents

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1 labor, the people who run the railroads; and one is the
2 tiebreaker I would say, the administrator. If there is a
3 question as to how things should be changed, it goes before
4 those board members.

5 The United States Congress passed the law to give
6 railroad employees an occupational disability in 1946.

7 Q. Were you trained on this?

8 A. Of course.

9 Q. When you mention, just regarding the training, not to
10 interrupt you, you can continue in a minute, but you mentioned
11 initially you went to Wisconsin, is that right? And you spent
12 how long there?

13 A. Three and a half weeks.

14 Q. Briefly, what was the function of that?

15 A. To train me in Railroad Retirement that I didn't know.

16 Q. Policies, regulations, procedures?

17 A. Laws, regulations.

18 Q. On a yearly basis thereafter did you receive any additional
19 training?

20 A. Yes. Annually they shipped all the managers out to Chicago
21 or St. Louis or Florida, wherever they could get cheap hotel
22 rooms, and they would train us in the new procedures coming up,
23 the regulations, anything that might have changed, anything
24 that might need to be changed. They put all the best people in
25 one place and tried to get them to figure out what to do next

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Baran - direct

1 when we were having problems.

2 Q. With regard to the training that you had, were you then
3 expected or otherwise required to train anybody else?

4 A. Oh, absolutely. I had to train my staff, and I was also
5 called upon to train the staff in Manhattan. I can only say
6 this is kind of like, some managers stay abreast of things,
7 some don't, so they asked me to train Manhattan. Sometimes
8 they would ask me to train Boston over the phone in conference
9 calls.

10 Q. You did that based upon the knowledge you gained in your
11 trainings?

12 A. Absolutely.

13 Q. With respect to informational exercises or disseminating
14 information or distributing your knowledge of what you know?

15 A. My point in telling you about the board members is there
16 was always one board member that was a little more powerful
17 than the others. That was usually the labor member. The labor
18 member gave all of us explicit instructions to keep labor
19 happy.

20 So we did. I would always reach out to the labor
21 unions and ask them if they would like me to present an
22 informational retirement seminar to their members.

23 All the big unions did that. Some of the smaller ones
24 got together and did it together. But I would do four, five,
25 six, depending on the year, retirement seminars for the

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Baran - direct

1 employees of the railroad who were members of that union.

2 Q. Now, is this the Long Island Rail Road or another railroad?

3 A. I did it mostly for the Long Island Rail Road.

4 Q. And when --

5 A. I went out to Amtrak once a year. They had something
6 called a health fair, and they used to invite me there.

7 Metro-North was not my area, but I was actually asked to go
8 there and do it anyway.

9 Q. When you were doing these seminars, what was the purpose
10 and function and goal of you conducting these multiple seminars
11 on a yearly basis to the unions?

12 A. It was to make sure that the people who were paying the
13 taxes into this system understood their rights and
14 responsibilities and the benefits they were entitled to.

15 Q. Was it your job to encourage them to apply or just make
16 them aware of what the benefits were so that, if they would
17 like to, it was their option to?

18 A. Well, to answer that question, I'll start by saying I was
19 invited by the member, the labor member of the Railroad
20 Retirement Board to join something called an informational
21 conference team. This was completely directed by the labor
22 member's office, and it would be managers going out to
23 different cities and doing informational conferences for, not
24 the employees, but for the union reps, in hope -- it didn't
25 work out this way, but in hope that they would then disseminate

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1 that information to their membership so that they would train
2 their membership in this.

3 But they did a PowerPoint program -- you have all seen
4 a PowerPoint program, with the little slides coming up on each
5 thing -- they did a PowerPoint program, and they told me I
6 could modify it for my use on Long Island, and that's what I
7 did.

8 I modified it, cut it down, made it a little shorter,
9 but it was all just to tell people what their benefits were.
10 Encourage them? No, there was no need to encourage them. They
11 knew what their benefits were. They knew when they would be
12 entitled to them because I pounded it into their heads every
13 year.

14 Q. At these seminars?

15 A. Yes.

16 Q. Now, I want to take you through the application process
17 itself. In the event that someone wanted to apply for an
18 occupational disability, what, if any, role did your district
19 office have when you were an RRB official, a Railroad
20 Retirement Board official, what, if any, role did your office
21 play in that regard?

22 A. Well, they would usually contact us first.

23 Q. Who is "they"?

24 A. The applicant would usually contact us first and say, I
25 would like to file for retirement, survivor benefits, or

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Baran - direct

1 disability, whatever it was.

2 Q. Once they did so, what then would they do?

3 A. Well, because my office was the busiest in the country, I
4 had Metro-North, Amtrak and the Long Island Rail Road right in
5 my backyard, so it was a very busy office. So we would work by
6 appointment. I would ask them to make an appointment to come
7 in.

8 Q. And once --

9 A. When they did that, we would usually tell them what it was
10 going to take. Perhaps if they told us exactly what they
11 wanted, let's say they wanted to file for disability, I might
12 mail out a package of material to them containing the
13 application, the vocational report, a list of documents that
14 are required to do the application, you know, and when to come
15 back in for the appointment.

16 I would mail that out to them, and usually when they
17 got that application, the next telephone call I would get would
18 say, Cancel that appointment. I'll get back to you when I know
19 I can finish this application.

20 I've heard the prosecution say here that this is a
21 simple, it was easy, they should have been able to do it
22 themselves.

23 Let's get a picture of who we're dealing with here.
24 These are guys who were working in steel tipped shoes and
25 hardhats. They were out on the track, or they are on a train,

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Baran - direct

1 or they are under a train, or they're climbing a pole. They
2 never deal with paper.

3 Most of them can't turn a computer on. They never
4 deal with paper. So when I sent them an application package
5 that contained a 13-page application, and a six-page vocational
6 report asking them to describe their job, their first reaction
7 was, I can't do this. I need help.

8 Q. With regard to your office's role or function, did your
9 office assist in them filling out the applications, or were the
10 applications filled out and then brought to your office?

11 A. We were instructed that we were not to fill out an
12 application for an annuitant unless they were unable to read
13 and write English.

14 Q. As a result of that, they were required, the annuitants --

15 A. To do it themselves or get help.

16 Q. To your knowledge, what percentage of the actual annuitants
17 who were applying retained the services of some type of
18 consultant to assist them with this application?

19 A. I would be guessing, but it's a very high percentage. It
20 has to be over 75 percent, probably closer to 85 percent.

21 Q. I want to get to the application, a specific application.

22 Now, if I could show you what is 104-A.

23 If you look at the top right of that, there's a name
24 there.

25 A. That is me.

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Baran - direct

1 THE COURT: Mr. Jackson, I don't mean to interrupt.
2 How much longer do you envision.

3 MR. JACKSON: Judge, I have a whole lot.

4 THE COURT: Why don't we take a ten-minute break at
5 this point.

6 (Recess)

7 (Continued on next page)

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Baran - direct

1 THE COURT: Counsel, please approach the bench before
2 we begin.

3 (Continued on next page)

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D7TMLES6

Baran - direct

1 (At the side bar)

2 THE COURT: Mr. Jackson, again, can you give us an
3 estimate? Because I need to know whether we should go overtime
4 today or whether you want to conclude with Ms. Baran before we
5 go into cross.

6 Just as an observation, I think that some of the
7 testimony might be somehow more condensed. She is going into a
8 lot of things that may be interesting and all that. I don't
9 know to what extent you need to go into a lot of that personal
10 stuff.

11 MR. JACKSON: It is going to take me a while, Judge.
12 I probably have another hour and a half maybe to go through,
13 maybe a little bit longer. I'll try to condense her and focus
14 her and make it more efficient. I think we have a lot of
15 ground to cover still.

16 THE COURT: Second point, returning to Mr. Mark,
17 during the last hour or so, hour and a half of the testimony, I
18 observed them essentially distracted by, he has like a little
19 knife or something and he plays with it. He fidgets a lot, and
20 I find it distracting because I have to keep an eye on him.
21 The jurors next to him also apparently find him distracted
22 because they keep watching to see what he's doing. The clerk
23 also reported that one of the jurors, again, approached him and
24 reported that Mr. Mark was engaged in I wouldn't say
25 disqualifying behavior but a little bizarre. I wanted to put

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Baran - direct

1 that on the record.

2 MR. DURKIN: Judge, I noticed there was a time when
3 you were looking at him and I looked over and I had two
4 observations. One, he has very thick eyeglasses, so it's kind
5 of hard to tell what his eyes are doing. But I did notice that
6 he uses his hands, but it was really just clasping them back
7 and forth.

8 THE COURT: He has a little knife or something, a nail
9 something, and he fidgets with it.

10 MR. DURKIN: I don't want to quarrel with the Court,
11 but I didn't observe him doing anything that I thought was
12 distracting, at least when I was looking at him, and I can't
13 profess to watch the whole time. But one time in particular I
14 did see you look, which had caught my attention, and I actually
15 came away comfortable from it.

16 MR. JACKSON: Your Honor, the good news is, I have
17 observed him and he's awake. That's a good thing.

18 THE COURT: I'm not saying today he is not awake. I'm
19 just saying that he's fidgeting and one juror reported
20 something, a little bit of an odd incident.

21 MR. WEDDLE: Your Honor, I think that if he's
22 bothering jurors to the extent that they are reporting things
23 to the Court, it's problematic. I think that type of thing can
24 throw a wrench into the entire jury dynamic, which can be
25 problematic, and I think that if jurors are having that kind of

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Baran - direct

1 interpersonal problem, combined with the observations the Court
2 has already put on the record, I think that it should be
3 stopped before it turns into a real issue.

4 THE COURT: I'm just creating a record.

5 (Continued on next page)

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Baran - direct

1 (In open court; jury present)

2 THE COURT: Mr. Jackson, you may resume.

3 MR. JACKSON: Thank you, your Honor.

4 BY MR. JACKSON:

5 Q. Ms. Baran, when we left off I was asking you about the name
6 in the top half of the page. You see that?

7 A. I do.

8 Q. And that would be you?

9 A. It is.

10 Q. Now, what is that?

11 A. That indicates that's the representative at the railroad
12 retirement board who took the application and approved it for
13 completion to be sent up to Chicago.

14 Q. I want to focus on that for a minute. Now, there is a date
15 there, February 13, 2005. Do you see that?

16 A. February 3.

17 Q. I'm sorry. February 3. February 3 of 2005. If I could
18 just ask you, what were the years that you were the director at
19 the railroad retirement board?

20 A. September 1987 to December 31, 2006.

21 Q. And at the time that you were there, at this time were you
22 the director when you --

23 A. I was the district manager.

24 Q. You were the district manager.

25 How many people were under you at this particular

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Baran - direct

1 time?

2 A. Four.

3 Q. What are the names of those people?

4 A. Kathleen Quinn, who is the new manager now; Lucy Lucas, who
5 is retired now; Roderick Sommers; and at various times there
6 was Judy DeChallis; Margaret Henry; and there is someone there
7 now by the name of Anthony --

8 THE COURT: Mr. Jackson.

9 MR. JACKSON: It is, Judge, very important, very
10 important.

11 Q. Who was the last person you mentioned?

12 A. Anthony, and I am not sure how to pronounce his last name,
13 but he was hired after I left.

14 Q. For the sake of time I am not going to go through all the
15 various applications. You've seen a number of them on the
16 screen with those designated individuals, would that be fair?

17 A. Yes, I have.

18 Q. When I say that, they have their signatures there as you
19 have yours there?

20 A. Um-hum.

21 Q. And could you tell us, what is the specific role? Let's
22 start with you. You were the person who approved this
23 application?

24 A. Um-hum.

25 Q. Let's start with this. When you say approved, what do you

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Baran - direct

1 mean?

2 THE COURT: Ms. Baran, please answer yes, no. The
3 reporter does not know what um-hum means.

4 THE WITNESS: I beg your pardon. I'm a little hoarse.
5 I have a candy in my mouth. I'll take it out. So sorry.

6 Q. Now, I want to start with you. When you get an
7 application, this is an application that you reviewed, tell us
8 specifically what your responsibility, what your role is, what
9 you do to approve an application when an applicant comes to
10 you.

11 A. Okay. Well, this applicant came in and because I ran the
12 busiest office in the country, I had to do the same job that my
13 contact reps did at various times, so I was interviewing this
14 individual.

15 Q. Not to interrupt you, when you say your contact reps, the
16 people who worked for you?

17 A. Exactly.

18 Q. The individuals that you just mentioned just now?

19 A. Yes.

20 Q. Tell us what you did.

21 A. Sometimes I did it out of respect for a union official. I
22 don't know who this application is, but I'll bet that's what it
23 is. And I took the application. That means I sat down with
24 the individual, I reviewed all the answers on the application,
25 I might, if I saw something that I thought was questionable,

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Baran - direct

1 might ask them, are you sure about this? Are you sure about
2 that? I would make sure everything was there that needed to be
3 there.

4 Q. I just want to be specific, and I will not go through this
5 with each of the names that we saw there.

6 A. Okay.

7 Q. I just want to be clear. The names that you mentioned
8 before, did you train all those people that you just talked
9 about?

10 A. I did. They went to a training course in Chicago for three
11 weeks, like I went to Chicago -- Wisconsin, they all went to
12 Chicago. And when they came back I had to supplement their
13 training.

14 Q. When we say supplement their training, specifically what
15 did you do?

16 A. Keep it current. Of course, I had to review everything
17 they did for the first year that they worked to make sure that
18 they had learned everything they needed to in Chicago. I had
19 to fine-tune their training.

20 Q. Now, again, I'm not going to take you through every
21 application of all the people who worked for you and what they
22 did, but I want to focus on this application and you.

23 A. Okay.

24 Q. The first section of the application, this person comes in.
25 This person happens to be Christopher Parlante. Just briefly,

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Baran - direct

1 if you can, take us through Section 2. You're the
2 representative at the RRB, Christopher Parlante comes to you.
3 What do you do as it relates to Section 2?

4 A. I always make sure the spelling of the name is correct
5 because once you put it into that computer it's hard to correct
6 it. And the Social Security number is of supreme importance
7 because, unfortunately, we are all nothing but a number. I'll
8 check the address, check the phone number, and confirm it with
9 them.

10 Q. Where is the applicant when you are doing this?

11 A. Right in front of me.

12 Q. Are they required to be in front of you at all times when
13 you're reviewing the application?

14 A. Most certainly.

15 Q. Before taking you to the next section, about how long,
16 generally, does it take to review an application with an
17 applicant?

18 A. Depending on the applicant's ability to cooperate and
19 answer questions, anywhere from 45 minutes to an hour and a
20 half.

21 Q. I want to take you to the next section, Section 3. What is
22 that?

23 A. Section 3 is describing the conditions causing them to file
24 the application.

25 Q. Where does that information come from?

D7TMLES6

Baran - direct

1 A. It is supposed to come from the medical that's with them
2 and that's what I would do. I would always verify those things
3 are in the medical. And very frequently I would find other
4 things in the medical that weren't listed there.

5 Q. In the event that that happens, what would you then do?

6 A. I would ask them if it was okay for me to amend their
7 application.

8 Q. And with respect to the other representatives, we will do
9 six for one with one application, what did you train them to do
10 with regard to --

11 A. Precisely the same thing. Actually, they were better at it
12 at me because they did it more than I did.

13 Q. Question 7, 8, 9, what are you doing and where is the
14 applicant as you're looking through that?

15 A. The applicant is with me and the date, they enter the date
16 this condition began to affect your ability to work. There has
17 been a lot of hoopla about that question all through the trial.
18 And basically railroad retirement is only really interested in
19 one thing in that area, the last day you were able to work.

20 Q. What does that mean?

21 A. The day before you retired, usually, or the day before you
22 took off sick. So Christopher Parlante probably took off sick
23 on June 6 and retired at the end of the month, with a July 1
24 retirement date.

25 Q. When you say June 6, it says June 4?

D7TMLES6

Baran - direct

1 A. 5th I thought I said.

2 Q. 5th?

3 A. Yes. Sorry.

4 Q. That date, when you hear about people planning that they
5 are going to be occupationally disabled --

6 A. It's just the last day they plan to physically work.

7 Q. What, if any, reason would that have to be the date to be
8 incorporated into that application either by you or the six
9 reps that you mentioned?

10 A. Because you are not entitled to file an application for
11 disability until you are no longer working.

12 Q. Now, with regard to the rest of this page, there is another
13 section -- what is question 11?

14 A. Enter the date you could no longer work because of your
15 condition.

16 Q. For example, a person puts a narrative here. Do you check
17 that as a representative?

18 A. Sure.

19 Q. And what, if anything, do you do in checking that? Do you
20 confirm that with them?

21 A. Absolutely. That's probably priority one. We would
22 confirm that and sometimes we get a little different
23 interpretation, and we will make amendments and what have you,
24 but usually it's stays the same.

25 Q. Section 4, what's that?

D7TMLES6

Baran - direct

1 A. Section 4.

2 Q. Yes.

3 A. Have you received medical care. Yeah. That's a question
4 asking back in the days when they didn't have to bring in
5 medical, that was really important. So if they said they had
6 received care, we would ask them to bring that medical in.

7 Q. Again, with regard to every item on this application, is
8 the applicant in front of you while you're checking this?

9 A. Yeah. Those questions, if he had handed me medical and I
10 saw they were answered yes, I wouldn't necessarily review them
11 with him. That would be a no-brainer. I had the medical in my
12 hand. He has obviously been to a doctor.

13 Q. Now, the next page, this says there is a Steven King, M.D.,
14 et cetera.

15 A. It says inpatient or outpatient, they didn't go to a
16 hospital for this. It was an outpatient MRI done in a facility
17 where they just do MRIs, and that would be listed there so that
18 we would know those MRIs should be in our file.

19 Q. When you are saying we, again, and I won't --

20 A. Railroad retirement board wants them to be there and I
21 would have to verify that.

22 Q. Again, with regard to the we, are you referring to your
23 training and the members that you mentioned?

24 A. Exactly.

25 Q. And with respect to my questions as they relate to this

D7TMLES6

Baran - direct

1 application, will you presume I'm talking about you and the
2 people that you trained?

3 A. Yes.

4 Q. Now, it says dates treated or tested. Do you see that?

5 A. I do.

6 Q. What are those dates?

7 A. April 22, '04, he had an MRI of the cervical spine; and
8 then September 16 of '04, he had one of his lumbar spine.

9 Q. Are these things that are just made up or are they a way
10 for you to independently confirm whether those objective tests
11 were taken?

12 A. They have to be in front of me or I won't take the
13 application as complete.

14 Q. What has to be in front of you?

15 A. Those MRI findings, the report.

16 Q. And that would be as an attachment of some sort?

17 A. Of course.

18 Q. Let's skip to the next page.

19 What's this?

20 A. It indicates the name of the patient, the patient's doctor,
21 who is treating him, and the dates he has gone to that doctor,
22 the dates treated or examined. That's every date that he could
23 remember that he went to the doctor. It's usually right in the
24 medical because we get the doctor's office notes.

25 Q. And when we go to the dates treated or examined and it

D7TMLES6

Baran - direct

1 indicates the type of treatment or examination, is that
2 something that a representative would confirm with the
3 information you have available to you?

4 A. Basically. This is an orthopedic, so, yes, we would look
5 at it. We have it in front of us. We may not confirm it with
6 the employee, but it's in front of us. We have got the
7 exams -- his paperwork in front of us and we would say, this is
8 good, it's all here.

9 Q. What, if anything, are you saying to the person, the
10 applicant who is sitting --

11 A. Somebody like me who rattles on, I might say, it confirms
12 that this is your medical from Dr. Lesniewski.

13 Q. Moving to the next page, what are these items, just
14 briefly, 22, 23, 24?

15 A. They are asking if you're medically disqualified by the
16 employer. In my 18 and a half years I've seen two people
17 medically disqualified. The railroad never wants to say that
18 you can't work for some reason. So you don't see that very
19 often. That's always a no. And medical restrictions are
20 usually a yes because if you are going to a doctor, he will
21 usually tell you that for this condition you shouldn't be
22 lifting or bending or whatever.

23 Q. What is a medical disqualification?

24 A. That would be that the railroad would sign a piece of paper
25 that says, this man is no longer qualified to serve as an

D7TMLES6

Baran - direct

1 electrician or a conductor or what have you. That's an
2 absolute automatic occupational disability.

3 Q. I want to direct you now to Section 5. Let's look at
4 Section 5 here.

5 Now, it looks like in Section 5, when you see on
6 question 31 and 34, it looks like the no is scratched out. Do
7 you see that?

8 A. I'm guessing here that the employee did this, only because
9 it says I attended technical school. And the person who filled
10 this out said no. You see, this is just called a skip pattern.
11 It says go to item 32. If he changed it to yes, he should have
12 filled in where he went to technical school. So it looks like
13 the employee might have said, oh, I did go, but he didn't
14 bother to put the name of the school in. The certificate
15 license I received is currently valid and he scratched out no.
16 But he still didn't clarify this. Now, I should have clarified
17 this when I was doing the application. I didn't.

18 Q. Meaning, you should have put the school in?

19 A. Yeah.

20 Q. And that would have been something that you missed?

21 A. Yeah.

22 Q. Now, moving to the next section, Section 6, there has been
23 a lot of discussion about this section 6.

24 A. There certainly has.

25 Q. Explain Section 6 to us, please.

D7TMLES6

Baran - direct

1 A. Okay. They want you to check the box after each activity
2 listed below that best describes your ability to do that
3 activity. Now, easy, I can easily do the activity. Hard, I
4 can do the activity with difficulty or with help. Not at all,
5 I cannot do the activity, even with help.

6 Q. Now, explain this whole section. Let's start with the
7 choices that you have. And in doing this for 18 years as a
8 representative of the railroad, how often do you see easy
9 checked off?

10 A. Hardly ever.

11 Q. Why?

12 A. Okay. This is my pet peeve in the whole world. There is
13 three answers there. We have got to answer one. We have no
14 choice. We have got to answer one. And the scope of it goes
15 from sublime to ridiculous. It's easy or I can't do it at all
16 and then there is a tiny little middle that says it's hard for
17 me. The whole point of this hard is that we are supposed to
18 explain it, how hard is it, why is it hard. So we really have
19 no choice. I don't know what Mr. Parlante's disability is
20 here. I haven't had the opportunity at this point to see it.
21 But let's just say, to be able to explain in a way, it's either
22 a back problem or a neck problem. Because we did see MRI of
23 the neck and MRI of the lumbar spine.

24 So if I was to say to him, sitting. In your head
25 think about this. Can you sit easy, hard, or not at all? He

D7TMLES6

Baran - direct

1 is probably going to say easy. Then I am going to say, for
2 extended periods of time. Because that's what they are really
3 looking for. If it was my application, that's what it would
4 say. It would say, for extended periods of time, it's hard for
5 me to do. Most of us who have been sitting here for two weeks
6 know what it's like to sit in that chair for a couple of hours
7 at a time. If you have got a bad knee, it's stiff. If you've
8 got a bad back, it's starting to ache. My neck is killing me.
9 So that's why hard is the answer. We are talking about people
10 who are claiming to be disabled. We are not talking about
11 somebody who is in great health. We are talking about people
12 who worked on hard jobs, doing hard chores every day eight
13 hours a day. So now that they are all beaten up, is it hard or
14 easy for you to stand for long periods of time.

15 Q. Now, what, if any, comparison needs to be made by the
16 representative between the answers here and the actual medical
17 that accompanies the application?

18 A. Exactly. When we are doing this, and we are looking at it,
19 we have got MRIs in front of us who give us -- the reports give
20 us every aspect of what their result is. Now, if we fill it
21 out incorrectly, if we don't make it -- when I say we make it,
22 let's say I'm interviewing the guy and I'm doing this
23 application for him in my office as a representative of
24 railroad retirement. It's a rare occasion, but sometimes we
25 did it. If I was filling it out and I put it was easy for him

D7TMLES6

Baran - direct

1 to sit, an examiner in Chicago might say, not with these
2 conditions it isn't. If I put not at all and an examiner in
3 Chicago looked at the MRIs, they would say, that's ridiculous.
4 What do you mean, you can't sit at all. So the middle ground
5 here is hard. And if it doesn't comply with what the examiner
6 sees on those MRIs and the doctor's medical reports, they are
7 going to disregard it.

8 You know, they are looking at this application down in
9 Chicago and they are going to disregard it because as
10 Mr. Coleman said when he was sitting here for a few hours, the
11 real weight is the medical. The doctor's report is the real
12 weight. Yes, they look at some of these findings and see what
13 the employee is saying, and usually they will find that it is
14 consistent with the medical.

15 Q. Now, when you are looking at this, as compared to medical,
16 I just want to be clear, you keep mentioning Chicago. What's
17 the relevance or significance of Chicago in this discussion?

18 A. I'm sorry if I assume. Forgive me. Chicago headquarters
19 is where the decision for the disability determination is made.
20 Mr. Coleman was a supervisor from the post, which they don't do
21 initial determinations. But if the young lady from the initial
22 disability had come here, we would have gotten all these
23 answers.

24 Q. What do you mean, initial? The people that you trained,
25 that you work with?

D7TMLES6

Baran - direct

1 A. The initial decision, when the application first gets
2 there, they make an initial decision. Post determines the
3 total and permanent and the continuing disability reviews.

4 Q. So in the event that Section 6, through your experience of
5 18 years, not only you, but the people you train, to the extent
6 that Section 6 would be inconsistent with objective medical
7 criteria, what, if anything, in your experience, would happen?

8 A. I think the Chicago examiner would dismiss it.

9 Q. And are there instances where it needs to be rewritten?

10 A. Well, if somebody comes in with an application already
11 done, most of the people doing applications as consultants
12 prior to myself were union officials, and their knowledge of
13 railroad retirement was limited. So sometimes they might
14 answer something that was off base, and we would just discuss
15 it with the annuitant.

16 Q. When you say the annuitant, that's the individual --

17 A. Who is filing the application. I'm using railroad
18 retirement jargon and I apologize for that. Too many years on
19 the job. But I might say to them, for instance, let's say I
20 had a person here who had acid reflux, like my husband does.
21 And I would say, you say it's easy for you to eat. But do you
22 have time for spicy foods and things like that that will bother
23 you because of your acid reflux, and they would say yeah. We
24 will change that to hard and we will tell them acid reflux
25 causes difficulty with spicy foods and sometimes causes me

D7TMLES6

Baran - direct

1 gastrointestinal problems.

2 Q. You're referring to your work when you were at the railroad
3 retirement board?

4 A. I am.

5 Q. When you're doing that, is there any incentive or
6 disincentive or anything else to assist the applicant to win an
7 occupation disability award?

8 A. It is our job to do our best to prepare an application to
9 completeness in an attempt to get the employee an occupational
10 disability. That is our job. We are their advocates.

11 Q. With respect to being their advocates, does that require
12 you to exaggerate, lie, put things on the application that are
13 not true?

14 A. Absolutely not.

15 Q. In any of your training that you've referenced that you did
16 before, does that come up in any of your training, that you
17 should exaggerate on behalf of the applicant?

18 A. No. But we are told that we are their advocates and it is
19 our responsibility to help them. Sometimes -- I mean, okay,
20 let's go back to the obvious again. Sometimes we are talking
21 about people who barely speak English who work track at Amtrak.
22 They don't require them to speak English on the tracks. So if
23 they came into my office and wanted to do a disability
24 application, it would really be up to me to do it to their
25 advantage, not lying, not exaggerating anything, but to do the

D7TMLES6

Baran - direct

1 best I would as if it was my father doing the application, and
2 that's exactly what I told my reps. Forgive me again. I'm
3 using jargon, but the contact reps who work for me treat
4 everybody in this office like they are your mother or they are
5 your father, and we will get along fine.

6 Q. Now, as far as the actual processing of the application and
7 your doing the job for them, if I can ask you, when you're
8 working with the applicant to do the job and you're matching,
9 for example, the medical or anything else, to what extent does
10 this information come from you versus the applicant?

11 A. It comes from the applicant.

12 Q. And when you are speaking with the applicants who have this
13 application prepared already, what is your intent in -- for
14 example, you mentioned for the acid reflux, right? And you
15 said, you have it easy here but I see your condition is acid
16 reflux. When you eat too quickly or you eat too much, is there
17 any issue? As a matter of fact, there is. What, if any,
18 reason is there for you asking that question?

19 A. Because I am their advocate and I am making that
20 application be the best it can be for him to receive an
21 occupational.

22 THE COURT: Mr. Jackson, just wait for one second.
23 Can we take the seventh inning stretch. The jury can just
24 stand and stretch a little bit.

25 Q. Ms. Baran, I want to direct your attention to question 40.

D7TMLES6

Baran - direct

1 Same section. Question 40. What is that?

2 A. It's activities of daily living.

3 Q. What are the activities of daily living? What does that
4 mean?

5 A. This question, as we were trained in Chicago and everywhere
6 else we went, Wisconsin, basically relates to the capability of
7 the client who we are speaking to. As a contact rep, our
8 manager of the offices, I use this question to make sure that I
9 had a capable, stable individual in front of me.

10 Q. When you say capable and stable, are you referring to their
11 physical or mental condition, or both?

12 A. Mental condition. For instance, I had a Long Islander in
13 front of me one day who told me about his bad knees. And then
14 I proceeded to ask him the questions. Now, the questions,
15 which I frequently prefilled when I was a consultant, because I
16 used them as prompts, so I would remember to ask them, remember
17 that I had to go in that direction. And then I would change
18 them as I spoke to the individual, regardless of what some
19 people told you here. This is where I would ask questions
20 like, how do you sleep? Most people will tell you after 50
21 they don't sleep great. They have pains here or pains there.
22 What time do you get up in the morning?

23 But as a manager I always ask these questions slowly
24 and got into it a little bit with my clients, especially if I
25 had a suspicion. After 40 years of doing disabilities, I did

D7TMLES6

Baran - direct

1 get suspicious. But I had a guy in front of me who could
2 barely sit in that seat. He was twitching around. It was the
3 end of June. I don't remember exact date, but it was the end
4 of June and he said to me, he finally said to me in part of the
5 conversation, I hate the 4th of July. I said, why is that? He
6 said, you know, I served two tours over in Vietnam and when
7 those firecrackers go off, I'm back in Vietnam. My kids can't
8 even see me on the 4th of July. I spend the day in the closet
9 or the night in the closet with headphones on so I don't have
10 to hear the fireworks.

11 Now we got a whole different disability application.
12 This man has emotional issues. He has got posttraumatic
13 stress. And no matter how good his knees are or not, he does
14 not belong on the railroad, that's for damn sure. I would
15 develop the application that way then. 99 percent of the
16 applications were all normal. This is where we picked up the 1
17 percent that wasn't. But the normal ones get up, have
18 breakfast, they shower, they walk the dog, they go see their
19 mother, whatever they do. But we are not looking to prove a
20 disability in this box unless it's a psychiatric one. We are
21 just looking to see that they are capable.

22 Q. Now, with regard to the actual, what you are looking to see
23 and what you are looking to evaluate, did it come to your
24 attention, when you were a railroad retirement board
25 representative, that there was a specific form upon which

D7TMLES6

Baran - direct

1 question 40 was formatted?

2 A. Well, actually, it goes the other way. Once I determine
3 that there might be a psychiatric problem, I would then have --
4 I would then go through a 13-question form called activities of
5 daily living which takes this to the extreme and asks all the
6 questions about why don't you sleep well, when did this start,
7 is this a change, when did this change occur. We are looking
8 to pinpoint the condition.

9 MR. JACKSON: With the Court's permission I'm about to
10 approach.

11 Q. Before I deal with this, you mentioned activities of daily
12 living, correct?

13 A. Yes.

14 Q. Activities of daily living, where does that come from?

15 A. It's a generic -- forgive me. I have to think for a
16 second. It's a generic term that psychologists and
17 psychiatrists use. If I at railroad determine if we have an
18 occupational disability based on any type of mental disorder,
19 even if it's just a panic disorder -- I don't mean to minimize
20 that, but if it's a panic disorder rather than somebody who is
21 really off there, we have to send them to a psychiatrist. And
22 the actual questionnaire that the psychiatrist fills out is
23 this extended activities of daily living, the same way we do.
24 We do it in the office. Then the psychiatrists do it. I guess
25 they compare them afterwards.

D7TMLES6

Baran - direct

1 Q. I am going to show you an activities of daily living
2 report. And in showing it to you I'm going to ask you if it
3 addresses a daily routine, sleeping and rest, personal hygiene,
4 meal preparation, hobbies, shopping, transportation, finance,
5 socialization, and employment, which is B4.

6 Ms. Baran, can you look at that document. Take your
7 time and look up at me when you are done.

8 A. This is the form that I used at railroad retirement. From
9 my past experience I know Social Security uses one of their
10 own, but, again, don't forgot, they are trying to prove a total
11 and permanent disability. We are not.

12 Q. You do recognize that?

13 A. Yes.

14 Q. What specifically do you recognize that to be?

15 A. This is where I actually took my little prompts from. This
16 is an activities of daily living questionnaire and it's the
17 questions we want to ask to pinpoint capability.

18 Q. When you say we, you're speaking about you --

19 A. Contact representatives, yes.

20 Q. And that form is one that you've used throughout that 18
21 years that you were at railroad retirement board?

22 A. Yes.

23 Q. Did you also use that form when you were at social
24 services, or was it a different form?

25 A. Social Security has their own form. It even has the SSA

D7TMLES6

Baran - direct

1 number. It's on all the websites out there. All the lawyers
2 who want to represent people who have been denied it at Social
3 Security have it on their websites. It's out there. This one
4 is not out there.

5 Q. Does that form fairly and accurately represent and
6 otherwise depict the form that you use to establish the
7 questions to question 40?

8 A. It does.

9 MR. JACKSON: Judge, I would move B4 into evidence at
10 this time.

11 MR. WEDDLE: No objection.

12 THE COURT: Admitted without objection.

13 (Defendant's Exhibit B4 received in evidence)

14 Q. Now, Ms. Baran, did there come a time that you decided to
15 leave the railroad retirement board?

16 A. I didn't want to leave. It was a great job. It really
17 was. I have a lousy back. They did just did surgery on it.
18 Part of my job was running around the country on airplanes and
19 staying in hotels with lousy mattresses and that got a little
20 old and I couldn't do it anymore. The other part of my job was
21 to manage my office. And even though there were men in my
22 office, it wasn't their responsibility to keep the office in
23 condition. It was mine. So if a box of supplies came in, they
24 were busy doing things, so I had to move that box of supplies,
25 kick it around with my feet, because I couldn't pick it up. So

D7TMLES6

Baran - direct

1 it became a chore.

2 It was no longer that great job I had for 18 years.
3 And I had 40 years of federal service. Once you have 40 years
4 of federal service, your pension is really not going to get any
5 higher. You're working for milk money. It didn't make any
6 sense anymore. I was 60 years old. I wasn't in great shape
7 and I said it's time. So I did. But I have to say, I was very
8 reluctant to retire because I lived a very active life in this
9 job, that I was terrified I was going to be bored, as are many
10 people who retire, and so I decided to do some consulting on
11 the side to fill up a day or two in the week.

12 Q. Before we get to the consulting, which we are moving into
13 momentarily, when you were working for the railroad retirement
14 board, did you yourself as a federal employee qualify for
15 occupational disability?

16 A. I could have if I wanted to.

17 Q. Did you file any application as it related to occupational
18 disability?

19 A. No, I didn't. I loved my job, even though it hurt.

20 Q. You mentioned you flew around the country.

21 A. I did.

22 Q. What were the reasons for that?

23 A. The labor member sends people from their office to the
24 conferences I went and presented to the Long Island Railroad
25 and Metro North. And when they came to my conference they

D7TMLES6

Baran - direct

1 said, we would like you to become a member of our informational
2 conference team. And that's where managers from different
3 areas would get together and go to St. Louis, Atlanta,
4 Pittsburgh, and we would give informational conferences to not
5 just the employees. There were no employees there, usually.
6 It was all union officials, just union officials. That's who
7 we were addressing; like I said before, in the hopes that they
8 would spread that information to their membership. It was much
9 harder to do than a conference on Long Island. There was a lot
10 more preparation involved. It was a lot of standing involved.

11 I'm very short. I don't like to be without high
12 heels. So I stood for two and three hours in front of a group
13 of 2 or 300 people with a microphone in hand. That's what I
14 said today. If they would just let me stand up, I would feel a
15 lot more comfortable. I had to do this for two or three hours
16 at a time. As much as I enjoyed, I love people, I loved
17 working with them, I couldn't do it anymore.

18 Q. If I could just ask you a couple more questions about this,
19 again, before we go to consulting. About how many applications
20 did you yourself assist with during those 18 years, the
21 disability application?

22 A. Hundreds.

23 Q. And if we can just break it down for an accurate figure,
24 say, for example, in any given month, how many applications
25 would you be involved in assisting?

D7TMLES6

Baran - direct

1 A. I would do at least one a week, if not two.

2 Q. So every particular month we are talking about?

3 A. Yeah. Some months more.

4 Q. And you did that throughout the course of the 18 years
5 there?

6 A. Yeah. More so in the beginning than in the end.

7 Q. Did you develop any familiarity as you did these
8 applications what the various positions of the people who were
9 applying for occupational disability?

10 A. Of course. We had to read all their job descriptions.

11 Q. When you say the job descriptions, their job descriptions,
12 are you referring to people at the Long Island Railroad?

13 A. Yes.

14 Q. And did you do the application, for example, of signalmen?

15 A. Oh, yeah.

16 Q. And yard masters?

17 A. Yes. As few as there are.

18 Q. Station masters?

19 A. Yes.

20 Q. Warehouse people?

21 A. Oh, yes.

22 Q. Block operators?

23 A. Yes.

24 Q. Without going through the whole list, of course, your
25 husband was an electrician, is that correct?

D7TMLES6

Baran - direct

1 A. Yes.

2 Q. Did you become familiar in the review and work with these
3 people of the various occupational disabilities that they would
4 endure?

5 A. Absolutely.

6 Q. Did you come to an understanding as to what the specific
7 job would entail?

8 A. I did. They were very emphatic about telling me what they
9 did. They enjoyed telling me.

10 Q. I am going to show you what's been marked B5A through B5Q,
11 which are various job descriptions of people who work for the
12 railroad.

13 I am going to show you what has been marked, as I just
14 mentioned to you, B5A through B5Q. I want you to take a look
15 at these items. You don't have to read them all. Just review
16 them. Just take a look at me when you are done.

17 A. I see them.

18 Q. Did you complete applications for these job descriptions in
19 your capacity as a railroad retirement board manager?

20 A. Yes, I did.

21 Q. And what was the frequency with which you completed
22 applications for these various parties?

23 A. Again, at least one or two a week. In the months when
24 retirements were heavier, my office did 20 of them a week.

25 (Continued on next page)

D7tnles7

Baran - direct

1 Q. What I just gave you, do those descriptions fairly and
2 accurately represent the descriptions of how they appeared when
3 you were in that office dealing with these annuitants who were
4 applying for disability?

5 A. Most people use this as a guide to help them complete their
6 vocational report.

7 MR. WEDDLE: Objection, your Honor. Speculation.

8 THE COURT: Sustained.

9 Q. Do you have any particular knowledge as to what those
10 people did?

11 A. The wording on the applications almost came verbatim from
12 here.

13 Q. That is because you assisted in the applications, correct?

14 A. That is because they would bring me this as part of their
15 vocational report if I was completing the application, but more
16 likely than not it would already been completed when they came
17 into the office.

18 MR. JACKSON: Judge, I move those into evidence at
19 this time.

20 THE COURT: Mr. Weddle?

21 MR. WEDDLE: Your Honor, I don't object to them coming
22 into evidence, but I don't think they have anything to do with
23 the application materials that she reviewed.

24 MR. JACKSON: I could lay more of a foundation if you
25 like, but I think they do.

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1 THE COURT: Admitted without objection.

2 MR. WEDDLE: Based on her testimony, your Honor.

3 THE COURT: Admitted without objection.

4 (Defendant's Exhibits B5A through B5Q received in
5 evidence)

6 MR. JACKSON: OK.

7 THE COURT: Again, Mr. Jackson, you don't need to go
8 over every single one.

9 MR. JACKSON: Of course not, Judge.

10 Q. Without going through all of these, OK, I just want to ask
11 you, for example, I am going to show you a signalman, which is
12 B5A. There we go. Essential functions of the job. Do you see
13 that?

14 A. I do.

15 Q. Do you see where it says walking, balancing, climbing,
16 standing, turning, bending, scooping, crouching, stooping,
17 kneeling, sitting.

18 Do you see that?

19 A. I would like to correct you if I May.

20 Q. Absolutely. You always do.

21 A. It says walking on ballast, not walking and balancing.

22 Q. OK. I'm sorry.

23 A. That is so critically important, because ballast, which
24 absolutely nobody in this room knows what it is but the guys
25 from the railroad, are little rocks, little stones that are

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Baran - direct

1 thrown between the trackbed, and this is what they have to walk
2 on all day long. It is like walking on a bed of nails. Your
3 knees and your back are constantly being jostled around by this
4 uneven terrain.

5 Q. Without going through all of them -- by the way, is there
6 anything else besides ballast that you want to speak about?

7 A. No.

8 Q. Are you sure?

9 A. The rest of them are pretty self-explanatory.

10 Q. This would indicate again the requirements. And then,
11 without reading them all, specifically, what stooping means,
12 for example, if we go to stooping, bending at the waist, etc.,
13 etc. OK. You have to answer yes or no.

14 A. Yes.

15 Q. This is something that you would see repeatedly, is that
16 correct?

17 A. Absolutely.

18 Q. That's for signalmen. Let's just say for example, for a
19 yardmaster.

20 For a yardmaster it indicates walking, balancing,
21 climbing, standing, turning, twisting, reaching, lifting. In
22 other words, the various physical requirements associated with
23 each job, correct?

24 A. Absolutely.

25 Q. These are in evidence for the jury to see or not see at

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1 their convenience or perusal, but with regard to all of these
2 jobs, without taking you through them, are you aware of -- and
3 we'll do just a couple more. Block master, for example.

4 A. Who? I'm sorry. I didn't hear you.

5 Q. I'm sorry. Block operator. I was thinking yardmaster.
6 Block operator.

7 A. OK. I thought they had a new one.

8 Q. Do you see the various physical requirements associated
9 with this?

10 A. Yes, I do.

11 Q. The final thing that I will show you, and, again, I won't
12 go over -- there's many more. The electrician, for example.
13 Do you see the electrician job?

14 A. I do.

15 Q. Do you see the various physical requirements associated
16 with this job?

17 A. I do.

18 Q. Would it be fair to say again walking, balancing, climbing,
19 kneeling?

20 A. They are all there.

21 Q. With that page it talks about the nature of the crouching
22 and stooping. It even gives you to the right what you have to
23 lift, endplate 60 pounds. This is for an electrician, correct?

24 A. Yes, it is.

25 Q. That is something that your husband did?

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Baran - direct

1 A. That's right.

2 Q. You see where I just said lifting endplate 60 pounds, etc.

3 Would it be fair to say that with all the jobs that I
4 showed you, which would B5A through B5Q, that you came to learn
5 that there are various physical requirements associated with
6 the job?

7 A. Yes, I did.

8 Q. The people who came to see you were generally working for
9 how many years engaged in these activities for which the
10 physical requirements are associated?

11 A. A minimum of 20, a maximum of 40. 38 I think was the most
12 I've ever seen.

13 Q. 38 years.

14 A. That I've ever seen. If you go to Metro-North they're 40,
15 42.

16 Q. I want to direct your attention now from what we were about
17 to get into, which is after you left your job at the Railroad
18 Retirement Board.

19 A. Yes.

20 Q. Before I do, I want to be clear in that 18-year period of
21 time, again when you left about how old were you now?

22 A. I was 60.

23 Q. At that particular time when you left you were about 60
24 years old?

25 A. I was 60 in September. I left in December.

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1 Q. In the 18 years that you were there, again, any arrests?

2 Anybody come to arrest you at that time?

3 A. I had one issue in my 18 years there. I made a mistake one
4 day.

5 Q. I am asking you about arrests. I will get to your issue.

6 A. I was never arrested.

7 Q. Any FBI agents came to your house?

8 A. No, never.

9 Q. Members of the NYPD come to your house?

10 A. No, never.

11 Q. Nassau County Police Department?

12 A. No.

13 Q. Suffolk Police Department?

14 A. No.

15 Q. With regard to any disciplinary issues and the like when
16 you were there, what, if anything, happened?

17 A. I made a mistake one day. I am very human. And I signed
18 on to the Social Security database while I was on the phone
19 with a Social Security supervisor who was helping me clear up a
20 problem on one of our spouses. A big issue is that the spouses
21 work for Social Security and the husband works for Railroad
22 Retirement.

23 But remember I said we were the blueprint for Social
24 Security? Well, because of that, if you as a spouse get
25 Medicare, it is on your husband's number, but he is a

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1 railroader. Most people hate this. I don't know why. The
2 women hate this. But even mine, my Medicare card has his
3 number on it because he is a railroader.

4 Social Security gives us the right of way in
5 everything, because we came first. So I was on the phone with
6 a Social Security rep trying to clear up a problem for a lady,
7 and I was on the Social Security database, which we were
8 allowed to get into when we needed to. But we are not allowed
9 to do it -- and I completely forgot about this -- for people we
10 knew. OK.

11 So we had our conversation. We straightened out
12 something for this lady, who had an issue. Then I said to her,
13 by the way, while you are on the phone, I mean, I knew her.
14 She was a supervisor while I was working at Social Security.
15 We were old friends.

16 I said, by the way, while we're on the phone, take a
17 look and see why my sister's application for Social Security is
18 taking so long.

19 She says, Well, you got the database right there in
20 front of you. Put her number on. And the keys went and it was
21 done before I could think. I couldn't do anything about it.

22 I went, Oh, God.

23 So she said -- I said, I don't even know what I am
24 looking at. Tell me what's going on.

25 She said, It is not delayed anymore. It is actually

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1 being processed. She should hear momentarily.

2 I kind of like held my breath and hoped nobody
3 noticed. I clicked off.

4 And within a day or two I got a phone call from the
5 security department from the Railroad Retirement Board, and
6 they said, Do you know Theresa so and so?

7 I said, Yes, it's my sister.

8 I said it was a stupid mistake. I did it while I was
9 talk to go a Social Security rep. The requirements there, was
10 an absolute two-day suspension no matter who did it. Even if
11 it was a member of the labor board, you were not allowed to
12 break these rules about security, and I had.

13 Q. Did you receive a two-day suspension?

14 A. I did. I took three more and made it a week's vacation.

15 Q. Beyond the two-day suspension that you got, was there any
16 other disciplinary action --

17 A. No.

18 Q. -- that you were ever subject to in that 18 and a half
19 years?

20 A. No, not in the 40 years.

21 Q. So you are saying that time and the Social Security
22 Administration?

23 A. Yes.

24 Q. With regard to you leaving, deciding to retire and taking
25 up the role of a disability consultant, what, if anything,

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Baran - direct

1 factored into your analysis to go and to not retire but to fill
2 up your time with another job?

3 A. Well, to be perfectly honest, I had been looking at all
4 these applications for 20 years. People had been doing
5 consultative work for railroad employees for 20 years. I
6 looked at these applications and I said, I'm so more qualified
7 to do this than any of these people are. I think I can do a
8 better job of it. I had more to give and more knowledge to
9 offer them than just filling out a piece of paper.

10 I said, you know, maybe I will throw my hat in the
11 ring and do it a little bit so I won't be bored.

12 I happened to mention this once at a function, and I
13 immediately got an offer from one of the labor unions: We got
14 extra, lots of empty space in our office. You can have one of
15 our offices to work out of.

16 Q. What labor union offered you to do that?

17 A. That would be the TCU. They called it the T -- the
18 Transportation Communication Union.

19 They graciously offered me the space at no fee, and I
20 said, well, that would be a way for me to figure out if this is
21 going to work or not, and I did it.

22 The rest, as they say, is history. It worked out.
23 People started calling me and I started doing it.

24 THE COURT: Mr. Jackson, before we get into any more
25 history. Why don't we take a break at this point for the day.

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1 Let me caution the jury once again that because the
2 government has rested and some of the defendants are putting on
3 a case does not mean that you are free to begin any form of
4 deliberations.

5 Do not discuss the case among yourselves or with
6 anyone outside or have any contact of any kind with anyone
7 involved in the case or read any account. If any of these
8 things occur, you are directed to inform the Court immediately
9 and not discuss it with your fellow jurors. We will adjourn
10 until tomorrow at 9 a.m.

11 (Continued on next page)

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1 (Jury not present)

2 THE COURT: All right. If we may quickly review the
3 status for tomorrow.

4 Mr. Jackson?

5 MR. JACKSON: Yes, Judge.

6 THE COURT: Do you have a reading?

7 MR. JACKSON: I think I can probably be done with my
8 case tomorrow by -- I can't speak for how long the cross of
9 Ms. Baran will be, but I could probably limit it tomorrow to
10 two, maximum three witnesses.

11 THE COURT: How much longer with Ms. Baran?

12 MR. JACKSON: I would think I need about another hour
13 fifteen minutes or so with her.

14 THE COURT: So that's 10 o'clock.

15 MR. JACKSON: Why don't we safely say 10:30.

16 THE COURT: Mr. Weddle, any indication of the length
17 of any cross?

18 MR. WEDDLE: We haven't gotten too far into the story
19 I think, your Honor. Right now I would say about 30 minutes,
20 40 minutes maybe.

21 THE COURT: All right.

22 You say you have another two or three, Mr. Jackson.

23 MR. JACKSON: Yes, Judge. Your Honor, yes, I do,
24 about two or three witnesses.

25 I will certainly be done tomorrow. I would think

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1 early afternoon, Judge, that I would be done.

2 THE COURT: All right. On that assumption, we will
3 aim to have the draft set of instructions for you probably by
4 the close of business tomorrow, and we should aim to have a
5 first charging conference probably Wednesday morning.

6 And if that schedule works, we should be looking at
7 beginning of closing arguments sometime by the middle of
8 Wednesday morning and through the afternoon, which means that
9 we might be into jury instructions either late Wednesday or
10 more likely Thursday morning.

11 All right. Mr. Durkin?

12 MR. DURKIN: Judge, did you give any more thought, I
13 know I discussed with you earlier the issue of the amnesty
14 program and those results. I think you said you were going to
15 consider that. I said I would ask for the results from the
16 government. I am assuming that is something we can do by
17 stipulation.

18 THE COURT: Mr. Weddle, do you have any other response
19 to that.

20 MR. WEDDLE: We still think it is totally irrelevant,
21 your Honor, and would require a lot of rebuttal evidence about
22 the fact that some people have participated, some people have
23 been arrested and pled guilty, and I don't think any of this is
24 something that the jury should be concerned about. And it
25 postdates the relevant intent and conduct of all of these

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1 defendants, your Honor.

2 THE COURT: All right. Thank you.

3 Mr. Durkin, on that issue, I am going to agree with
4 the government. I think it can turn out to be a great
5 distraction, and I believe that any probative value that it may
6 have for the defense is minimal. I think on that basis it is
7 best not to.

8 MR. DURKIN: Could I just state for the record, Judge,
9 at least my proffer, that at least as I understand it there
10 were roughly 1500 letters sent out to 1500 annuitants, which is
11 virtually the entire universe of annuitants, and out of that
12 universe of annuitants only 84 or 86, as I understand it,
13 accepted. That would be my proffer.

14 THE COURT: All right. Understood.

15 The problem that I see, which I think essentially the
16 government's argument, or part of it, is that why people would
17 choose to accept or not accept amnesty is something that is
18 going to vary substantially among 1500 people, and I don't
19 believe that we have a basis here for making any generalization
20 or drawing any conclusions or even inferences as to what may
21 have caused only 80 out of 1500 to choose one course of action.

22 MR. DURKIN: I am told I misspoke. It's 44 to 46.

23 THE COURT: All right.

24 MR. DURKIN: Not 84 to 86, 44 to 46.

25 THE COURT: I think even with the revised number, I am

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1 not persuaded.

2 MR. DURKIN: I understand.

3 Could I ask one thing, Judge?

4 THE COURT: Yes.

5 MR. DURKIN: I think Ms. Friedlander and I have had
6 some discussions about a stipulation regarding Dr. Lesniewski's
7 tax returns from his PC. You may recall the government offered
8 the exhibits, they introduced his tax returns, and then they
9 offered this exhibit from the United Healthcare.

10 THE COURT: Yes.

11 MR. DURKIN: I want to introduce his because the
12 individual returns don't have his corporate returns. His
13 individual returns only have his W-2 income and then any profit
14 from the PC.

15 He had a PC, and the PC itself filed returns. I want
16 to introduce those returns, the corporate returns, to show the
17 gross receipts because I think that is a more applicable
18 apple-to-apple comparison. I want to make sure that we can
19 reach a stipulation on that, because otherwise I have to call
20 the accountant tomorrow.

21 THE COURT: Ms. Friedlander?

22 MS. FRIEDLANDER: Yes, your Honor.

23 The corporate returns are passthrough. The income
24 that he takes from the corporation in the form of salary and
25 profits goes through to his personal income tax returns. It is

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1 the source of all of his income, in fact, under the returns
2 that we introduced. This money that he's showing you here --
3 let me just withdraw that.

4 We told Mr. Durkin that there are a couple of things
5 that we would want to see in a stipulation and absent those
6 things we would like him to call this witness.

7 MR. DURKIN: Judge, can I just show you.

8 THE COURT: Yes.

9 MR. DURKIN: This, for example, 2005 return, all the
10 United Healthcare money and all his income even from the
11 narratives is contained on this line, the line where my finger
12 is, line 1a.

13 That's the gross receipts. There is nothing about
14 fall-through or anything else. The only apple-to-apple
15 comparison to make regarding these United Healthcare payments
16 is how they reflect to the gross receipts.

17 I would like to introduce a chart that will be roughly
18 the number -- I will have the 2003 and 2004 by tonight. But
19 you can see the difference. I mean, if you compare 50,000 to
20 say 190,000, it is a horribly dramatic difference in terms of
21 the money, and it's totally misleading. This is exactly the
22 apple to apple.

23 MS. FRIEDLANDER: Your Honor, it is completely not the
24 apple to apple. He has like fixed expenses. He is a doctor.
25 He pays malpractice insurance, he pays rent, he pays employees,

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1 I would assume. Every dollar that he earns in income from the
2 insurance company is another dollar that comes into his pocket.
3 This is all money -- sure it comes in as gross receipts to his
4 business, and it all is money that comes into his pocket.

5 Mr. Durkin's argument would make sense if there were
6 some additional expenses that get deducted from this in some
7 way. There is nothing like that. This money all comes right
8 through to Dr. Lesniewski's pocket.

9 I don't have a copy of his personal income tax returns
10 with me here, but you can see, your Honor -- actually, I do.
11 I'm happy to hand them up.

12 The income from this business from this PC, the salary
13 and the profits flow through to Dr. Lesniewski. So if you took
14 this money out of his corporate returns, that is how much his
15 personal income would have been reduced, his personal gross
16 income would have been reduced by in these years.

17 MR. DURKIN: Judge, I have the return.

18 MS. FRIEDLANDER: I hope I'm being clear because
19 Mr. Durkin is completely misstating.

20 MR. DURKIN: I am not misstating a thing. It's
21 completely wrong. That would be like saying if I get an extra
22 fee in a given year it all ends up in my pocket. That is
23 absurd.

24 Here's the 2005 return. You can see it has gross
25 \$95,000 in W-2 income, and another \$71,000 from statement 2.

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1 I will show you statement 2, which is \$60,000 from the
2 PC and 2 percent of his medical insurance, another \$11,000.
3 That is his total income.

4 They shouldn't be permitted to get an inference that
5 somehow because he got \$50,000, that's \$50,000 compared to
6 \$199,000. It's \$50,000 compared to \$631,000.

7 THE COURT: Mr. Durkin, why don't you prepare the
8 chart that you are indicating you would like, and let's do this
9 tomorrow.

10 MR. DURKIN: OK.

11 THE COURT: We will have the full information before
12 us in a form that lays out the dispute.

13 MR. DURKIN: Can I at least, though, can we at least
14 agree that if you agree with me that I don't have to call the
15 accountant?

16 MS. FRIEDLANDER: Your Honor, we will not stipulate --
17 I am glad he put this up, your Honor, because you can see
18 clearly that he takes a salary both from his company and the
19 profits flow through to him on his income statement.
20 Mr. Durkin pointed out in statement 2 here that it says MD PC,
21 he gets \$60,000. If he earned \$50,000 less in United
22 Healthcare payments that year, that number would be reduced by
23 \$50,000.

24 MR. DURKIN: That is not even --

25 MS. FRIEDLANDER: Of course it is true. If he's

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1 suggesting that there are some independent expenses associated
2 with UHC figures, which of course there are not, then his
3 argument would make sense, your Honor.

4 We have not said we won't stipulate. We just said
5 that are two facts we would insist on seeing in any
6 stipulation.

7 First, that the records he wants to introduce, the
8 line item he wants to point this jury to reflects gross
9 receipts of the practice, not income to Dr. Lesniewski
10 personally or profit to Dr. Lesniewski personally.

11 And, second, Mr. Durkin just said to the Court that
12 Dr. Lesniewski's income tax returns include all of the
13 thousands and thousands and thousands of dollars in cash that
14 people were paying him for narratives. We don't have
15 information to that effect. I would like to understand what
16 basis he has to say such a thing. If he doesn't, we would like
17 to put that accountant on the stand and ask him that.

18 MR. DURKIN: Judge, I am astounded by that.

19 They have interviewed everybody at Island Sports
20 Medicine. They know full well that that money went into Island
21 Sports Medicine accounts that were calculated towards him.
22 They have not one iota of good faith in announcing that to you
23 here.

24 THE COURT: Mr. Durkin, what about getting an
25 affidavit from this accountant indicating the facts that the

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1 government has suggested be part of your presentation? Would
2 that help?

3 MR. DURKIN: I am not sure what fact they want. I
4 don't understand it.

5 THE COURT: The facts that Ms. Friedlander indicated
6 they would want to see in a stipulation, if they are facts that
7 are part of your presentation.

8 MR. DURKIN: I'm happy to get him on the phone. If
9 they want to interview the accountant, I'm happy to let them
10 talk to the accountant. I'm happy to do that. I will
11 stipulate to whatever he will say about that, if that's OK.

12 THE COURT: Why don't you discuss this some more
13 overnight. See if an affidavit from the accountant would
14 address the concerns that the government is asking be a part of
15 the stipulation. Perhaps the accountant can give the
16 government assurance the assurance that they are seeking,
17 clarify the issues that they want clarified, and then we may be
18 able to resolve it that way.

19 MR. DURKIN: Do you understand my point?

20 THE COURT: I understand the point, yes.

21 MS. FRIEDLANDER: Do you understand the government's
22 point?

23 THE COURT: There are technical issues. I hesitate at
24 the moment because when two professionals get involved in these
25 technical issues about accounting or facts, they are not the

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1 kinds of things that we can take judicial notice of or accept
2 and not have the jury be left with all kinds of questions.

3 MR. DURKIN: My only point, is, Judge -- I will just
4 use my own practice, and I don't know what your experience
5 was -- just because you get an extra \$50,000 in fees in a given
6 year doesn't mean you get 50,000 more dollars into your
7 pocketbook. It doesn't drop down automatically.

8 THE COURT: I understand that very well.

9 MR. DURKIN: I wish it did. I only wish it did.

10 THE COURT: All right.

11 Let's see if you can work it out by having further
12 discussions, if necessary contacting the accountant, if
13 necessary getting an affidavit attesting to the facts about
14 which there is dispute.

15 MR. DURKIN: That's fine.

16 THE COURT: Then present your chart in the form that
17 you seek, and we can revisit the issue tomorrow again.

18 MR. DURKIN: That's fine. Thank you.

19 THE COURT: Let's aim to do it after -- when would be
20 the most appropriate time? After Mr. Jackson concludes?

21 MR. DURKIN: That's fine.

22 THE COURT: All right.

23 Now, would counsel approach for another moment.

24 (Pages 2300 to 2306 sealed)

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1 (In open court)

2 THE COURT: I will see you tomorrow at 9.

3 (Adjourned to Tuesday, July 30, 2013, at 9:00 a.m.)

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GOVERNMENT EXHIBITS

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16042099

1605, 1608, 1609, and 16102103

550 and 5512105

553 and 8132112

303-A0, 719, 100-A through D, 113-A2119

through D, and 554-A through E

1 8032138

2 8202139

3 800, 800A, 801 and 801A through E2144

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5 30 and 6502175

6 570 and 5712206

7 DEFENDANT EXHIBITS

8 Exhibit No. Received

9 R-62115

10 B42276

11 B5A through B5Q2282

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